Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

STEW LEONDARD'S,

Petitioner,

v.

ANN M. VENEMAN, UNITED STATES SECRETARY OF AGRICULTURE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of April, Two Thousand and Two.

PRESENT: HONORABLE Joseph M. McLaughlin,
HONORABLE Fred I. Parker,
HONORABLE Rosemary S. Pooler,
Circuit Judges.

STEW LEONARD'S,

Petitioner-Appellant,

v. No. 01-6111

ANN M. VENEMAN, UNITED STATES SECRETARY OF AGRICULTURE,

Respondent-Appellee.

APPEARING FOR APPELLANT: James A. Wade
(Jeffrey M. Thomen on brief),
Robinson & Cole, LLP
Hartford, Connecticut

APPEARING FOR APPELLEE: Douglas Hallward-Driemeier
Department of Justice,
Civil Division,
Appellate Staff
Washington, DC

Appeal from the United States District Court for the District of Connecticut (Thomas P. Smith, Magistrate Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

Petitioner-appellant Stew Leonard's appeals from the decision of the United States District Court for the District of Connecticut (Thomas P. Smith, Magistrate Judge) affirming the determination of the Secretary of Agriculture that Stew Leonard's, a Connecticut milk handler and retailer, did not qualify as a "producer-handler" under the provisions of 7 C.F.R. § 1001.10 (1999) despite its entrance into a lease arrangement with a local milk producer.

After completing review pursuant to 7 U.S.C. § 608c(15)(A), the Secretary determined that Stew Leonard's was a "handler" as defined in 7 C.F. R. § 1001.9, not a "producer-handler" as defined in 7 C.F.R. § 1001.10. Specifically, the Secretary found Stew Leonard's was not a "dairy farmer" and did not provide "as [its] own enterprise and at [its] own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk" as required by the language of 7 C.F.R. § 1001.10.

The district court reviewed the Secretary's determinations under the deferential standard outlined in the Supreme Court's Chevron USA , Inc. v. Natural Resources Defense Council, Inc, 467 U.S. 837 (1984) decision, finding the Secretary's narrow interpretation of the "producer-handler" definition consistent with both the purposes of the regulations and past interpretations thereof,

and her application of the regulation to Stew Leonard's supported by substantial evidence. See Stew Leonard's v. Glickman, 199 F.R.D. 48, 55-56, 57-58 (D. Conn. 2001). The district court thus concluded that the Secretary's decision was not arbitrary and capricious, but rather "in accordance with the law," within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (E) Id. at 60.

This Court notes that the evidence demonstrated no change in the daily operation of Oakridge Farm after the execution of the lease agreement and that Stew Leonard's admitted it did not know how to run a dairy farm. Id. at 57-58. As noted by the district court, these facts provide substantial evidentiary support for the Secretary's conclusion that Stew Leonard's was not a "dairy farmer" and did not "[p]rovide[] as [its] own enterprise and at [its] own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk." See 7 C.F.R. § 1001.10(a)(1999). Bound by the constraints of deferential review, this Court affirms the district court's decision on the grounds that the Secretary's determination that Stew Leonard's did not fit the narrow definition of "producer-handler" was adequately supported.

This Court affirms the district court's grant of summary judgment on Stew Leonard's due process and equal protection claims for substantially the same reasons stated by the district court. Stew Leonard's, 199 F.R.D. at 60-61.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie,
Clerk

By:
s/
Lucille Carr, Operations
Manager

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STEW LEONARD'S :

v. : CASE NO. 3:00CV-627 (TPS)

DANIEL GLICKMAN, :
UNITED STATES
SECRETARY OF
AGRICULTURE

JUDGMENT

This action having come on for consideration of the parties' cross motions for summary judgment before the Honorable Thomas P. Smith, United States Magistrate Judge and,

The Court having considered the motions and the full record of the case including applicable principles of law, and having filed its Ruling on Cross Motions for Summary Judgment on March 21, 2001, denying the petitioner's motion and granting the respondent's motion, it is therefore,

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the respondent.

Date at Hartford, Connecticut, this 21st day of March, 2001.

KEVIN F. ROWE, Clerk

S/_____
Carol Ihnatenko
Deputy Clerk

EOD: 3/22/01

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

STEW LEONARD'S,
Petitioner,

v. **NO. 3:00CV627 (TPS)**

DANIEL GLICKMAN, UNITES STATES SECRETARY OF AGRICULTURE,
Respondent.

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Pending before the court[1] are the parties' cross motions for summary judgment (**docs. 17 & 18**). Petitioner, Stew Leonard's Dairy ("Stew Leonard's"), brings this action pursuant to the judicial review provision of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c(15)(B), against respondent, Dan Glickman, United States Secretary of Agriculture, seeking reversal of the Secretary's March 16, 2000 decision to deny Stew Leonard's "producer-handler" status under Federal Milk Order No. 1, 7 C.F.R. §§ 1001 et seq. (1999). Petitioner claims that the Secretary's decision is "not in accordance with the law," 7 U.S.C. § 608c(15)(B), because the Secretary's decision was arbitrary and

[1] The parties consented to jurisdiction by a United States Magistrate Judge, and this case was transferred to the undersigned pursuant to 28 U.S.C. § 636(c)(1) (**docket no. 15**).

capricious. For the reasons set forth below, the Secretary's decision is **AFFIRMED**, petitioner's motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**.

II. DISCUSSION

A. FACTS AND PROCEDURAL BACKGROUND

The facts giving rise to this petition are not in dispute, and are set forth in the administrative record filed with the court in this matter.

In order to view the facts in the proper context, an explanation of the underlying regulatory scheme is essential. In the United States, the milk industry is beleaguered by two unique characteristics. One characteristic is the existence of "a basic two-price structure that permits a higher return for the same product, depending on its ultimate use." Zuber v. Allen, 396 U.S. 168, 172 (1969). Milk, regardless of whether it is produced for consumer drinking or product manufacture, is produced in the same manner. The difference lies in the price the end product can fetch in the consumer market; a handler[2] can sell fluid milk at a higher price, thereby allowing the producer to charge the handler a premium for milk destined for drinking. This premium fosters intense competition amongst the producers to sell their milk at the premium price.

The other unique characteristic is "that production yield varies seasonally, resulting in oversupply in the summer months." Minnesota Milk Producers Ass'n v. Glickman, 153 F.3d 632, 638 (8th Cir. 1998). Because the consumer demand for milk remains relatively constant

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[2] Generally speaking, a "producer" is a person or entity who collects the milk directly from the animals, and a "handler" is a person or entity who takes this milk and turns it into an end product, and then resells it to either consumers or manufacturers.

throughout the year, and the animals' production fluctuates with the animals' nutrition supply during the year, producers must maintain a herd of animals that is able to meet the peak demand in the lean months. The effect of maintaining a herd that can meet the consumer demand in the winter months leaves the producers with a surplus of highly perishable milk in the summer, when the animals are the most productive. Historically, this glut allowed handlers to demand bargain prices because they could obtain their milk from an increased variety of sources because all the producers, both far and near, had a surplus they were anxious to dispose of.

After the milk market, as well as the market for other commodities, self-destructed under the strain of these two forces during the Great Depression, Congress stepped in and enacted the Agricultural Marketing Agreement Act of 1937 ("AMAA") , codified at 7 U.S.C. § 601 et seq. The purpose of the legislation was "to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." Zuber, 396 U.S. at 180-81. In order to effectuate this purpose, the legislation was intended to "raise producer prices and to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." Minnesota Milk Producers Assn, 153 F.3d at 637.

Specifically, the AMAA gives the Secretary of Agriculture the authority to issue orders governing the handling of agricultural commodities, see 7 U.S.C. § 608c(1), including milk, see 7 U.S.C. § 608c(5), through a system of marketing orders applicable to a designated region. To achieve equality among producers of milk, the marketing orders create a market-wide pricing pool for handlers. The marketing order sets minimum prices that the handlers may pay for the basic classes of milk. Handlers who deal primarily in high grade, or "fluid" milk, which is used to

produce milk intended for drinking, pay into a pool that is then drawn on by the handlers of the lower grade milk, or "surplus." Producers then receive a uniform, or "blend,"[3] price from the handlers irrespective of the use to which their milk is eventually put. See 7 U.S.C. § 608c(5); see generally Lehigh Valley Cooperative Farmers, Inc. v. U.S., 370 U.S. 76, 79-80 (1962) ("[T]he statute authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use. Adjustments are then made among the handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought.").

The regulatory effect of this pool can be demonstrated by a simple example. Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

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[3] The blend price is adjusted by a number of factors, none of which are germane to this proceeding.

Although, generally speaking, the regulatory scheme closely monitors the conduct of handlers, a certain category of handlers is exempt from participation in the pricing pool. The Secretary has chosen not require those entities that both produce and handle their own milk to make payments into the pool.[4] The regulations designate such entities as "producer-handlers." "Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production." Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). The rationale for this exemption is "that such businesses are so small that they have little or no effect upon the pool." Id.

The effects of this exemption are twofold. First, if the producer-handler uses all the milk it produces as Class I milk, it avoids having to make payments into the producer settlement fund; it merely sells the milk at the market price, which is tempered only by the production costs. Assuming all other conditions are equal, the exemption allows the producer-handler to make a greater profit because it sells Class I milk without having to pay the full Class I price into the settlement fund.

The second effect of the exemption is upon the pool as a whole. Because the total amount of Class I milk purchased in a marketing area is a factor in calculating the aggregate blend price for the marketing area, removing a handler's Class I purchases from the calculus brings the aggregate price down. Exemption of a handler who purchases a significant quantity of Class I milk from

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[4] The basis for enacting the AMAA is the Commerce Clause, and the nexus to interstate commerce is the handlers and not the producers, whose operations are generally local. See Dairylea Cooperative, Inc. v. Butz, 504 F.2d 80, 83 (2d Cir. 1974) ("Though the act affects producers, it was designed to regulate handlers only."). Although a producer-handler is not subject to participation in the pool, it is an entity within the purview of the AMAA. See id. at 83 n.6 ("When a producer acts as a handler he is not so exempted.").

producers in the pool depresses the blend price in the region.

This exemption may also provide an additional windfall to producer-handlers who "ride the pool." This term refers to a producer-handler who draws upon pool resources to compensate for any deficiency in its own supply during the lean production months, thereby allowing the producer-handler to maintain a relatively smaller supply of animals with a minimal surplus of milk in periods of greater production. Producer-handlers could also take advantage of the price regulation by "riding the pool" if they do dispose of any surplus because the milk they dispose of most likely is used as Class II or Class III milk, but the producer-handler is still able to collect the relatively higher blend price. Thus, in theory, producer-handlers who "ride the pool" could reap the benefits of the regulatory scheme without sharing the burdens.

The instant lawsuit concerns the scope of the producer-handler exemption from the regulatory pool in Connecticut. Petitioner, who operates a dairy retail store in Norwalk, Connecticut, because of a lease with Oakridge Farm executed on December 10, 1997, which was superseded by a subsequent lease executed on June 16, 1998, claims that it should be classified as a producer-handler. The lease provided that:

> 1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew

Leonard' s agrees to replace culls and/or attrition with newly bred heifers.

2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.

3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing, or packaging of milk. Also, Stew Leonard' s agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice 60 days prior to change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew

> Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

(Petition for Review of Agency Decision, Ex. G at 1-2). Petitioner believed that the lease transaction had the effect of creating one enterprise, which would then qualify petitioner for producer-handler status under the order.

In December of 1997, petitioner initially requested that the Market Administrator for the New England Marketing Order,[5] Erik Rassmussen, classify Stew Leonard's as a producer-handler under the order. Under the applicable provisions of this order, a producer-handler is defined as:

> any person who, during the month, is both a dairy farmer and a handler and who meets all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

---

[5] Since the initiation of the administrative proceedings, the Department of Agriculture has amended the nation-wide system of marketing orders by reducing the total number of marketing orders throughout the nation. See Milk in the New England and Other Marketing Areas; order Amending the orders, 64 Fed. Reg. 47898 (Sept. 1, 1999). Under this reorganization, the former New England Marketing Order became part of the Northeast Marketing Area. See 7 C.F.R. § 1001.2 (2000).

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The quantity of route disposition in the marketing area from the person's plant is greater than in any other Federal marketing area.

(d) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion pursuant to § 1001.15. If the producer-handler's receipts from own production and the total route disposition from the producer-handler's plant each exceed 4,300 pounds per day for the month, the producer-handler's receipts from pool plants are not in excess of 2 percent of receipts from own production. For the purposes of this paragraph, the producer-handler's receipts of fluid milk products shall include receipts from plants of other persons at all retail and wholesale outlets that are located in a Federal marketing area and operated by the producer-handler, an affiliate, or any person who controls or is controlled by the producer-handler.

7 C.F.R. § 1001.10 (1999) amended by Milk in the New England and Other Marketing Areas; Order Amending the orders, 64 Fed. Reg. 47898 (Sept. 1, 1999).[6]

---

[6] This definition has been changed since the initiation of the administrative action in 1998. The new text reads as follows:

Producer-handler means a person who:

After a period of correspondence with the Market Administrator, concerning various proposed changes to drafts of the leases, the Market Administrator declined to re-classify petitioner as a producer-handler in a letter dated February 6, 1998:

> The office has reviewed the various leases you have proposed. The stated purpose of the leases is to change the regulatory status of Stew Leonard's Dairy from a handler operating a pool distributing plant that purchases milk from producers to status as a producer-handler.
>
> There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently

---

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area during the month;

(b) Receives milk solely from own farm production or receives milk that is fully subject to the pricing and pooling provisions of this or any other Federal order;

(c) Receives at its plant or acquires for route disposition no more than 150,000 pounds of fluid milk products from handlers fully regulated under any Federal order. This limitation shall not apply if the producer-handler's own farm production is less than 150,000 pounds during the month;

(d) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products; and

(e) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) and the processing and packaging operations are the producer-handler's own enterprise and at its own risk.

7 C.F.R. § 1001.10 (2000). The parties have not suggested that this version of the regulation applies. Therefore, the court will apply the prior version of the regulation.

> operating producer-handlers to utilize additional sites for expansion purposes.
>
> The situation at Stew Leonard's Dairy is distinct from proposals received by some producer-handlers. You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S. C. 608 (c)(5) [sic]. The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.
>
> Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision, refer to 7 U.S.C. (608(c)(15)(A) [sic].

(Administrative Record, Ex. 100, PX 14). On February 17, 1998, petitioner commenced the administrative action by filing a petition for relief from the Market Administrator's February 6, 1998 determination pursuant to 7 U.S.C. 5608c(15)(A).[7]

---

[7] Such section provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with the law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with the regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with the law.

7 U.S.C. § 608c(15)(A).

The Secretary affirmed the Market Administrator's February 6, 1998 determination. On January 11 and 12, 1999, the parties presented evidence and testimony before an Administrative Law Judge ("ALJ"), who dismissed the petition and affirmed the decision of the Market Administrator. Petitioner then appealed to the Secretary of Agriculture, who, through a designated Judicial Officer, after modifying the ALJ's decision in some areas, also affirmed the decision of the Market Administrator on March 16, 2000.[8] Petitioner then commenced the instant action on April 4, 2000 pursuant to 7 U.S.C. § 608c(15)(B).[9]

B. REVIEW OF THE SECRETARY'S DECISION

The question before the court is whether the Market Administrator's classification of Stew Leonard's as a handler, and not a producer-handler, which was adopted by the Secretary after completion of the administrative review process, was "in accordance with the law" under 7 U.S.C. § 608c(15)(B). The Secretary held that

> 1. Petitioner is a "handler," as defined in section 1001.9 of the New England Marketing Order (7 C.F.R. § 1001.9).
>
> 2. Petitioner is not a dairy farmer.

---

[8] The administrative petition was amended to reflect the superseding lease executed on June 16, 1998. This version was the subject of the administrative review proceedings, and, consequently, is the subject of this court's review as well.

[9] This provision states, in pertinent part, that:

> The District Courts of the United States . . . are vested with jurisdiction in equity to review (the Secretary's] ruling. . . . If the court determines that such ruling is not in accordance with the law, it shall remand such proceedings to the Secretary with directions . . . .

7 U.S.C. § 608c(15)(B).

> 3. Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk, which Petitioner leases from Oakridge Farm.
>
> 4. Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Marketing Order (7 C.F.R. § 1001.10).
>
> 5. The Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Marketing order (7 C.F.R. § 1001.10), is in accordance with the law.

(Administrative Record, Ex. 88 at 62-63). Petitioner contends that the Secretary's decision was not in accordance with the law because it is arbitrary and capricious, in that the Secretary's ultimate decision is not supported by the weight of the evidence, and flies in the face of its prior action concerning classification of entities as producer-handlers.

The scope of the court's review is set forth in the Administrative Procedure Act, which states that

> [t]he reviewing court shall decide all relevant questions of law, interpret constitutional or statutory provisions, and determine the meaning or applicability of terms of an agency action. The court shall- . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion,

> or otherwise not in accordance with the law . . . [or] unsupported by substantial evidence....

5 U.S.C. § 706(2)(A) & (E). Cognizant of this standard, the court now turns to the precise issues in dispute.

1. SECRETARY'S INTERPRETATION OF 7 C.F.R. § 1001.10

A threshold issue is whether the law the Secretary eventually applied to reach his decision is a valid exercise of agency power. Petitioner states that

> [t]he administrator admitted under oath that the term "dairy farmer" is not defined anywhere in the regulations. Tr. at 298. The administrator has the sole power, without regulatory guidance, to decide what is and is not a dairy farmer. By failing to define a critical term within the definition of "producer-handler," the regulations themselves cede unlimited arbitrary authority to the administrator.

(Petitioner's Cross-Mot. for S.J. at 3 n.3) In addition, petitioner contends that respondent's interpretation of the regulation is contrary to the purpose of the governing statutory scheme. (See Petitioner's Cross-Mot. for S.J. at 22-23). Thus, petitioner argues that respondent' s construction of the regulation is legally deficient.[10]

---

[10] The ALJ, despite affirming the Market Administrator's decision, alluded to the fact that the degree of discretion afforded the Market Administrator in defining the precise contours of the producer-handler exemption to the regulatory pricing pool may not be legally permissible. (See Petition for Review of Agency Decision, Ex. I at 37 ("Lack of specificity in the regulations allow unlimited authority to the Market Administrator and provide fertile ground of uncertainty for those subject to his regulation.")).

When determining if an agency's construction of a regulation is legally permissible, the analysis is governed by the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See New York Currency Research Corp. v. Commodity Futures Trading Comm'n, 180 F.3d 83, 88 (2d Cir. 1999) ("Although Chevron dealt only with an agency's interpretation of relevant federal statutes, similar principles apply to judicial review of an agency's interpretation of its own regulations."). Pursuant to this framework, the reviewing court asks two questions. See id. at 842. First "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If this first question is answered in the negative, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Id at 844.

Because the governing statute, 7 U.S.C. § 608c(5), is silent on the determination of exemptions to the regulatory pricing pool, it is the second inquiry set forth in Chevron that applies here. In such a situation, the court must afford 'substantial deference to the agency's interpretation of its own regulations," and must give the interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). "In other words, [the court] must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Id. (internal quotation marks omitted). This deference to the agency is especially

important when "the regulation concerns a complex and highly technical regulatory program. . . ." Id. (internal quotation marks omitted).

The Secretary has narrowly construed the definition of producer-handler set forth in the regulations. The pertinent part of the regulation reads as follows:

> [p]roducer-handler means any person who, during the month, is both a dairy farmer and a handler and who meets all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001.10 (1999) amended by Milk in the New England and Other Marketing Areas; order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999). On its face, the regulation requires that, in order to be considered a producer-handler, an entity must be a dairy farmer, and must produce milk through its own enterprise and at its own risk.

When considering the criteria listed in the regulation as applied to leases, the Secretary has declined to state that a handler entering into a lease transaction with a producer can never pass muster, but has consistently held that such arrangements do not warrant re-classification of a handler as a producer-handler. The Secretary maintains that such transactions, despite the fact that they often appear to meet the criteria in the regulation, do not in fact meet the test because they are often constructed for the purpose of escaping regulation, and therefore it must interpret the

regulation strictly, in order to avoid the circumvention of the regulatory scheme. (See Petition for Review of Agency Decision, Ex. J at 27-28, 36 ("[A] handler that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not obtain producer-handler status.")).

This interpretation of the regulation is consistent with the plain language and also is faithful to the Secretary's intent at the time of the regulation's promulgation. In 1960, when the producer-handler concept as it now stands was promulgated, the Secretary offered the following explanation:

> Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production. Full regulation of such individuals provides considerable administrative difficulties. Normally, exemption from regulated status is made in a Federal order for such individuals on the grounds that such businesses are so small that they have little or no effect on the pool.
>
> * * * *
>
> In order to maintain producer-handler status, it is provided that the maintenance, care and management of the dairy animals and other resources necessary to produce the milk, and the processing, packaging and distribution of the milk shall be the personal enterprise of and the personal risk of the person involved. These standards are intended to distinguish the family-type operation normally involved, and to bring under full regulation operations which attempt to masquerade as those of producer-handlers in their normal concept

> through leases, rental arrangements, and other devices designed to circumvent regulation by the order.

Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). This explanation provides conclusive support for the Secretary's careful policing of its regulatory pricing scheme by strictly construing the definition of producer-handler.

Petitioner maintains that the Secretary's interpretation of the regulations is not consistent with the purpose of the legislation because the Secretary's strict construction of the requirements hinders petitioner's stated purpose for entering the lease transaction: to exercise control over the production of the milk so that it may implement a rigorous quality control program that far exceeds any mandatory regimen. Petitioner presented a great deal of evidence to this effect at the administrative hearing, and now argues that

> [t]he market administrator effectively seeks to penalize Stew Leonard's by making it bear the cost of a regulatory program even though such regulation of Stew Leonard's- a self-contained enterprise that simply produces milk and sells it at retail- would not serve the purpose of the program. The administrator seeks to bring Stew Leonard's back into the fold, such that Stew Leonard's would presumably resume purchasing lower quality milk from the dairy cooperative that once supplied its milk, and Oakridge Farm would resume selling its high-quality milk to the dairy cooperative to be blended with and diluted by the lower-quality milk of other farms.

(Petitioner's Cross-Mot. for S.J. at 24). As such, petitioner claims that failing to interpret the definition of producer-handler to include arrangements such as the one in the instant case serves as a deterrent to handlers such as Stew Leonard's inventing creative solutions to produce a higher quality product.

The fact that petitioner can meet its quality-control objectives under its current classification, albeit at a higher production cost, fatally undermines this argument. The evidence in the record demonstrates that conferring producer-handler status upon petitioner is not necessary to achieve the high quality product desired by Stew Leonard's; indeed, the fact that the present arrangement results in the production of a superior product was not disputed at any time in the hearing, but the fact that petitioner has been able to manufacture this superior product while still participating in the pricing pool precludes any causal connection between the status of producer-handler and the statutory objective of producing wholesome milk. Reprieve from the regulatory pool would lower the production costs for Stew Leonard's, but the purpose of the act is to promote the production of wholesome milk, and not to promote the production of wholesome milk at the lowest possible cost to the handler.

The Secretary's construction of the applicable regulation is in accordance with the law. It follows the plain language of the text, is consistent with the expressly stated purpose for the exemption, and does not betray the purpose of the AMAA.

2. SECRETARY'S APPLICATION OF THE REGULATIONS

Having decided that the construction of the law the Secretary was charged with applying was in accordance with the law, the court now turns to the question of whether the Secretary properly applied the evidence to the law.

The court reviews the agency's on-the-record findings in such cases under the "substantial evidence" test, as set forth in 5 U.S.C. § 706(2)(E): "[t]he court shall- . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence. . . ."[11] "[S]ubstantial evidence is more than a mere scintilla," and "must do more than create a suspicion of the existence of the fact to be established." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951) (citations, internal quotation marks omitted). The quantum of evidence, viewing the record as a whole, must be such that "it would have been possible for a reasonable jury to reach the [Secretary's] conclusion." Allentown Mack Sales & Service, Inc. v. N.L.R.B., 522 U.S. 359, 366-67 (1998). Thus, "[e]ven if a court could draw different conclusions from those drawn by the agency, that would not prevent the agency's decision from being supported by substantial evidence." Kinney Drugs, Inc, v. N.L.R.B., 74 F.3d 1419, 1427 (2d Cir. 1996) (citations, internal quotation marks omitted); see also Allentown Mack Sales & Service, Inc., 522 U.S. at 377 (noting that the substantial evidence standard "requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder.").

Petitioner contends that the Secretary's decision should be reversed for two reasons. First, it argues that the Secretary's finding that petitioner did not meet the

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[11] The type of on-the-record adjudication present in this case, where the court's review is confined to the formidable administrative record developed below, warrants application of the "substantial evidence" standard of review, to the extent it differs in substance from the "arbitrary and capricious" standard. See, e.g., In re Gartside, 203 F.3d 1305, 1314 (Fed. Cir. 2000) (applying the more specific "substantial evidence" standard rather than the general "arbitrary and capricious" standard because "our review of the Board's decision is confined to the factual record compiled by the Board in the underlying adjudicative proceeding"); Ass'n of Data Processing v. Bd. Of Governors, 745 F.2d 677, 638-86 (D.C. Cir. 1984) (characterizing the difference between the two standards as "largely semantic").

requirements of the definition of producer-handler is not supported by the weight of the evidence in the record. Second, petitioner maintains that the Secretary's decision is disingenuous because it flies in the face of prior departmental precedent.

The gravamen of petitioner's first contention is that the evidence shows that the lease in question gives it a great degree of control over the farming operations, and shifts a significant amount of risk from the Bahlers, the family who owns Oakridge Farm, to Stew Leonard's. Also, petitioner points out that it operates in the intuitively precarious position of paying rent for animals and equipment at a monthly rate, in addition to the monthly expenses of running the farm, and then has to conduct its accounting in such a way that complies with the federal regulatory pricing scheme. Petitioner maintains that, because of the logistics of this arrangement, and the fact that it contractually assumes much of the risks of conducting a farming operation, it should be considered one enterprise under the marketing order.

However, the Secretary's decision is supported by substantial evidence. The Secretary adequately considered both the evidence that supported petitioner's contention, and the evidence that bolstered the Market Administrator's decision. He examined the terms of the effective lease, which provides that "Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk," and that "Stew Leonard's agrees to assume all risk, responsibility and maintenance of the cows, equipment, buildings, and labor," (Petition for Review of Agency Decision, Ex. G, ¶ 3). He also noted the fact that Stew Leonard's "has paid the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinary services, and services to keep track of animals," (Petition for Review of Agency Decision, Ex. J, ¶ 23 at 19), and that Stew Leonard's maintains insurance on Oakridge Farm, (see id.). The

Secretary's findings to this effect were consistent with the evidence produced at the hearing.[12]

In spite of these findings, substantial evidence exists to support the conclusion of the Secretary. Specifically, the Secretary found that, despite the indicia of control discussed above, petitioner was not a dairy farmer who operated his own enterprise at his own risk. (See Petition for Review of Agency Decision, Ex. J at 27 ("The evidence establishes that Petitioner is not a dairy farmer . . . and that Petitioner does not provide, at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm Dairy herd and other resources and facilities used to produce milk. . . .")). The Secretary found that Stew Leonard's has no interest in the land itself under the terms of the lease. (See id., ¶ 30). In addition, the Secretary found that Oakridge Farm, which is the entity with which Stew Leonard's entered into the lease, retains a significant connection to Bahler Farms, Inc. an adjacent farm operation, in that the principals of Bahler Farms, Inc., are authorized to write checks for Stew Leonard's (see id., ¶ 25), records for Oakridge Farms are maintained at Bahler Farms, Inc. (see id., ¶ 27), the two operations purchase supplies jointly (see id., ¶ 26), and the two entities share "equipment and a full-time calf raiser, a mechanic, and full-time milkers," (see id., ¶ 24). Oakridge and Bahler also pledged security for a loan together (see id., ¶ 28), and jointly insure against a loss resulting from the joint operation (see id., ¶ 29). Finally, the evidence shows that Stew Leonard's does not know how to operate a dairy farm (see id., ¶ 33), and that the day-to-day operation of

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[12] Petitioner argues that the Secretary erroneously refused to adopt the ALJ's finding that "Stew Leonard's has also assumed, pursuant to the June 16, 1998, lease, all risks arising from the operation of Oakridge Farm." (Petition for Review of Agency Decision, Ex. I, ¶ 25). The Secretary was free to examine the evidence and decline to adopt this finding, and properly did so. The court is obligated to consider this disagreement when reviewing the evidence in the record, see Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496 (1951), yet finds that the evidence supports the Secretary's conclusion.

Oakridge Farm did not change at all after the execution of the lease (see id., ¶ 37).[13]

This evidence is sufficient for a reasonable jury to conclude that Stew Leonard's does not operate a dairy farm as its own enterprise and at its own risk. Although, without question, the lease places Stew Leonard's in a position to take a more active role in the production of the milk it sells, the evidence supports the conclusion that the lease had very little practical effect upon the symbiotic operation of Oakridge Farm and Bahler Farms, Inc. In this respect, the scenario closely resembles the ordinary purchase and sale of milk. Given the evidence presented, a reasonable conclusion to draw would be that, despite the fact that the lease was not a sham, Stew Leonard's is actually a handler posing as a producer-handler.

Petitioner, in a vigorous cross-examination of Erik Rassmussen, the Market Administrator of the New England Marketing Order at the time of the hearing, explored, at length, the limits and legal ramifications of the Market Administrator's knowledge and views concerning how much control and assumption of the risk of loss is necessary to be classified as a producer-handler. Although informative, the testimony elicited during the hearing from Mr. Rassmussen does not detract from his ultimate conclusion. Counsel for the petitioner asked pointed questions about complicated legal intricacies regarding the forms of business organizations and the distinctions between a lease and a transfer of property. Mr. Rassmussen admitted that he was not a lawyer, and, indeed, familiarity with these legal concepts is not qualification of his position; his job is to look at the circumstances as a whole, under the

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[13] Petitioner argues that the evidence connecting Bahler Farms, Inc. to Oakridge Farm should not be considered because the Market Administrator was not aware of these facts and consequently could not have based his initial determination upon this evidence. However, the statute clearly states that the court is to review the Secretary's decision, and not the Market Administrator's initial determination. Therefore, the court will consider the disputed evidence.

guidance of the provisions and purpose of the regulatory scheme, in order to make an informed practical determination. He does not have to explore every legal consequence of the transaction, or refute all indicia of control, rather he must use his knowledge and experience to determine if, practically speaking, the entity in question is a dairy farmer who conducts his operation at his own risk, or a handler who has donned a clever disguise-as a producer-handler. See Elm Spring Farm, Inc. v. U.S. 127 F.2d 920, 926 (1st Cir. 1942) ("The regulatory scheme embodied in the order is an intensely practical business, and the question now before us is not to be determined by a purely abstract inquiry as to who had 'title' to the cows which produced the milk.").

This emphasis on the practical effect is faithful to the purpose of the producer-handler exemption. The Secretary found that classifying Stew Leonard's as a producer-handler would have an impact upon the market as a whole.[14] Specifically, the Secretary found that Stew Leonard's would enjoy a competitive advantage over its rival milk handlers in the area by avoiding the pool equalization payments. (See Petition for Review of Agency Decision, Ex. J, ¶ 34). Furthermore, the Secretary found that this advantage would effect the market as a whole, (see id., ¶ 34), and that the size of Stew Leonard's operation could not be considered small, (see id. at 31). As previously noted, the purpose of the exemption was to forgo the regulation of smaller family-type operation because these operations do not have a significant effect upon the pricing pool, and therefore the burdens of regulating them outweigh the benefits to the regulatory pool. When an entity does have an effect upon the pricing pool, as a reasonable conclusion from the

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[14] This effect does not include "riding the pool" as discussed elsewhere in this opinion. No evidence suggests that Stew Leonard's would take unfair advantage of being awarded producer-handler status by "riding the pool."

evidence suggests Stew Leonard's does, the purpose of the exemption would be defeated.

Petitioner's second contention is that the Secretary's application of the producer-handler definition contradicts prior departmental decisions. In particular, petitioner presented evidence that three entities currently classified as producer-handlers lease a portion of their dairy herd, yet assume significantly less risk than that assumed under the terms of petitioner's lease. Petitioner argues that, because "[t]he Market Administrator concedes these leases do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk from the leased cows," (Petition for Review of Agency Decision, Ex. J ¶ 32), that respondent's finding that petitioner is not a producer-handler is contradictory to prior departmental actions.

The basis of petitioner's argument is that because the producer-handler lessees in the three other leases assume a lesser degree of risk than petitioner, petitioner should be granted producer-handler status. However, petitioner dismisses one key fact: the three producer-handler lessees were classified as producer-handlers prior to the execution of the leases. (See id.). This is certainly a credible reason for distinguishing between the other three leases and petitioner's; the three producer-handler lessees could not be accused of constructing a legal framework to avoid payments into the pricing pool, because, as producers and dairy farmers,[15] they were never subject to the pricing pool in the first place. Allowing existing producer-handlers to lease a portion of their dairy herd is entirely consistent with the express purpose of the producer-handler exemption because regulation of smaller dairy farms would have a

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[15] The Secretary found that "[e]very producer-handler in the New England Milk Marketing Order is a dairy farmer who owns a dairy farm." (Petition for Review of Agency Decision, Ex. J, ¶ 31).

nominal effect upon the pricing pool, even if they do supplement their milk production to some degree.[16]

Petitioner also cites a previous decision by the Secretary that classified an entity as a producer-handler despite the fact that its entire dairy herd was leased, and claims that, under this precedent, the Secretary's decision not to classify Stew Leonard's as a producer-handler would be unreasonable. Petitioner contends that there is no foundation for the Secretary's conclusion that an existing producer-handler can lease a herd, but a handler may not become a producer-handler through a lease transaction. Because there is a substantial basis for distinguishing the case in question, petitioner's argument fails.

In the case in question, In re Jerome Klocker, 26 Agric. Dec. 1050 (Oct. 30. 1967), the petitioner had "been the sole owner of all land, buildings, machinery, equipment and facilities of both the dairy farm and milk processing plant located thereon," id. at 1051, until he engaged in a sale and leaseback arrangement with a herdmaster in which petitioner sold his heifers to one Rausch, who then leased the herd back to petitioner, see id. The Secretary found that the transaction had no practical effect upon the operation of the farm; the herd was never moved off petitioner's property, Rausch was essentially an employee of the petitioner, and all the milk was produced from this herd in petitioner's facilities. See id. at 1051, 1055, 1057.

Upon consideration of these facts, the Secretary reversed the decision of the market administrator and

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[16] Petitioner challenges the Market Administrator's determination that a producer-handler who lease more than twenty-five percent of his dairy herd can no longer be considered a producer-handler, (see Petition for Review of Agency Decision, Ex. J, ¶ 32), and claims that this ad hoc determination is exemplary of the alleged abuse of the Market Administrator's power. This court is concerned with review of Stew Leonard's petition, which does not turn on the validity of the twenty-five percent line. For the purposes of this review, the court finds a substantial justification for drawing such a line in general, and does not pass on precisely where it should be drawn.

retained petitioner's classification as a producer-handler. In so finding, the Secretary noted that "[a]dmittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the 'producer-handler' definition contained in the order," and held that, "[p]etitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk," and "the production of the milk utilized at petitioner' s plant continued to be the enterprise and risk of petitioner subsequent to the [leaseback]. . . ." Id. at 1057-58.

The factual differences between Klocker and this case are manifest. In Klocker, the petitioner operated his own dairy farm and processing plant, but had a peculiar method of paying his herdmaster, a method that had no practical effect upon the operation of the farm for the purpose of the administration of the marketing order. In the instant case, petitioner never owned a dairy farm, and then leased the animals and fixtures, in addition to assuming some risk associated with the farm's operation, but the practical effect upon the operation of the farm for the purpose of the administration of the marketing order did not change. A fair reading of the case suggests that the Secretary should not elevate form over substance, and should, instead, look to the practical effect upon the regulatory scheme with which he is charged to implement. Viewed in this light, the state of affairs prior to the lease transaction, contrary to petitioner's assertions, is certainly a critical issue, and a permissible basis for differentiating between the cases. Such a reading supports the Secretary's decision in this case.

In sum, the Secretary's application of the governing regulation is supported by substantial evidence and therefore is "in accordance with the law." The Secretary has a duty to enforce the provisions of the AMAA, in such a way that adheres to the purpose of the act: to avoid ruinous pricing practices in the several market areas. The

Secretary's decision in this case was faithful to that purpose, and also was consistent with prior departmental action. The Secretary found that Stew Leonard's, under the terms of the operative lease, was not the type of entity deserving of exemption from the regulatory pricing pool because it had a cognizable impact upon the pricing pool, and the evidence showed that it did not assume the degree of risk necessary to be deemed a producer-handler.

As an aside, petitioner raises some concerns, echoed somewhat by the ALJ, regarding the determination of producer-handler status, in particular the gaps left in the text of the regulations regarding the lack of a definition of "dairy farmer" and the process for ascertaining where the line should be drawn with respect to the permissible percentage of outside milk handling by existing producer-handler leases. However, petitioner's concerns merely re-state a familiar problem: because Congress, or even the Secretary of Agriculture, cannot construct a legislative solution to every conceivable issue, much of the classification process is left to administrative discretion. Although some may lament this reality, courts have consistently held that it is lawful:

> [a] statute may be ambiguous, for the purposes of Chevron analysis, without being inartful or deficient. The present case exemplifies the familiar proposition that Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect.

U.S. v. Haggar Apparel Co., 526 U.S. 380, 392 (1999). A reviewing court must confine its review to the legality, and not the desirability, of the agency's action.

C. EQUAL PROTECTION

Petitioner claims that the Secretary's decision to deny Stew Leonard's producer-handler status is unconstitutional. It claims that the Secretary violated the equal protection guarantees of the Fifth Amendment when it granted producer-handler status to operations that lease a portion of their dairy herd, without assuming a significant portion of the risks involved, and refused to grant producer-handler status to petitioner, who leased a herd that fulfills all its processing demands, while assuming a significant portion of the risks involved.

The Fourteenth Amendment of the United States Constitution states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.[17] U.S. Const. Amend. XIV, § 1. This constitutional guarantee ensures that "all similarly situated persons are treated similarly under the law," such that "[i]f a (regulation) classified people, the classification must be based on criteria related to the [regulation's] objective." Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355, 363 (D. Vt. 1998).

In determining if this guarantee has been infringed, a reviewing court must apply the appropriate standard. The Supreme Court instructs reviewing courts as follows:

> In areas of social and economic policy, a [] classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.

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[17] "We approach equal protection claims under the Fifth Amendment in the same way as we would such claims under the Fourteenth Amendment." General Media Communications, Inc. v. Cohen, 131 F.3d 273, 285 (2d Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998) (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975)).

F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Since the case before the court concerns areas of social and economic policy, and does not involve suspect classifications or fundamental constitutional rights, the court will apply the minimum rationality standard. See id.

When applying the minimum rationality standard, a regulatory classification "is accorded a strong presumption of validity." Heller v. Doe, 509 U.S. 312, 319 (1993). The Secretary has no obligation to promulgate evidence in support of its decision, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Id. at 320 (internal quotation marks omitted), see also Able v. U.S., 155 F.3d 628, 632 (2d Cir. 1998) (applying the same standard). In sum, "[w]here there are plausible reasons for [the Secretary's] action, our inquiry is at an end." Beach Communications, 508 U.S. at 314 (internal quotation marks omitted).

The court finds a plausible and legitimate reason for the difference in treatment. As discussed herein, the Secretary's decision was based upon substantial evidence. As such, petitioner cannot sustain its burden of disproving any rational explanation for the difference in treatment.

IV. CONCLUSION

Petitioner has failed to demonstrate that the defendant's decision to deny it producer-handle status under the applicable regulations is not supported by substantial evidence, and therefore "not in accordance with the law," 7 U.S.C. § 608c(15)(B). Likewise, petitioner has not shown that defendant's application of the statutory scheme lacks a rational basis. Therefore, the decision of the Secretary of Agriculture is **AFFIRMED**, petitioner's motion for summary judgment is **DENIED**, and respondent's motion for summary judgment is **GRANTED**. The Clerk of the Court shall enter judgment for the respondent on all counts.

IT IS SO ORDERED.

Dated at Hartford, Connecticut this 21st of March, 2001.

s/ _____
Thomas P. Smith
United States Magistrate Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	98 AMA Docket No. M 1-1
	)	
Stew Leonard's,	)	
	)	
Petitioner	)	**Decision and Order**
		March 16, 2000

V. Introduction

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice] by filing a Petition pursuant to section 8c(l5)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner sought relief from the February 6, 1998, determination by Erik F. Rasmussen, Market Administrator for the New England Milk Marketing Order [hereinafter the Market Administrator], that a December 10, 1997, lease by Petitioner of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner. Petitioner alleged the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order has no rational basis in the law, is arbitrary and capricious, is an abuse of the Market Administrator's administrative discretion, and deprives Petitioner of property without due process of law in violation of the Fifth Amendment to the United States Constitution (Pet. ¶ 15(3)-(4)). Petitioner requested that the Secretary of Agriculture designate

Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. At 5).

On April 24, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be granted (Answer at 3).

Thereafter, Petitioner submitted to the Market Administrator a lease, dated June 16, 1998, executed by Petitioner and Oakridge Farm on the basis of which Petitioner again sought the Market Administrator's determination that Petitioner meets the definition of "producer-handler" under the New England Milk Marketing Order. On July 31, 1998, the Market Administrator advised Petitioner that its June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities did not qualify Petitioner as a producer-handler under the New England Milk Marketing Order.

On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements of a handler under the federal statutes, regulations, and milk orders" (Amended Pet. At 5-6). On August 21, 1998, Respondent filed Respondent's Reply to Motion to Amend Petition and

Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner's Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] granted Petitioner's Motion to Amend Petition and accepted Petitioner's Amended Petition (Ruling on Motion to Amend).

On January 11-12, 1999, the ALJ conducted a hearing on the Amended Petition, in Hartford, Connecticut. James A. Wade and Brian O'Donnell, Robinson & Cole, LLP, Hartford, Connecticut, represented Petitioner, Donald A. Tracy, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On Mach 30, 1999, Petitioner filed Petitioner's Proposed Findings of Fact, Conclusions and Order and Petitioner's Post-Hearing Brief; on May 17, 1999, Agri-Mark, Inc., and National Milk Producers Federation [hereinafter Intervenors][18] filed Proposed Findings of Fact, Conclusions and Order Submitted on Behalf of Agri-Mark, Inc. and National Milk Producers Federation; on June 11, 1999, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief [hereinafter Respondent's Post-Hearing Brief]; and on July 15, 1999, Petitioner filed Petitioner's Reply Brief.

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[18] On June 8, 1998, Intervenors filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Intervenors requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57). On July 9, 1998, the ALJ granted the Motion to Intervene "to the extend that [Intervenors] may file briefs" (Ruling on Motion for Leave to Participate in Proceeding).

On September 10, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ concluded that the Market Administrator's determination that Petitioner is not a producer-handler is in accordance with law and dismissed Petitioner's Petition (Initial Decision and Order at 37-38).

On October 13, 1999, Petitioner filed Appeal and Request for Argument: on December 13, 1999, Intervenors filed Brief of Agri-Mark, Inc. and National Milk Producers Federation in Support of Motion to Dismiss Appeal of Petitioner; on December 15, 1999, Respondent filed Respondent's Reply to Appeal [hereinafter Respondent's Cross-Appeal]; on February 28, 2000, Petitioner filed Petitioner's Reply to Respondent's Cross-Appeal; and on March 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and ruling on Petitioner's motion for oral argument before the Judicial Officer.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit pursuant to section 900.65(b) of the Rules of Practice (7 C.F.R. § 900.65(b)), is refused because the issues have been fully briefed by Petitioner, Respondent, and Intervenors; thus, oral argument would appear to serve no useful purpose.

While I agree with the ALJ's conclusion, many of the ALJ's findings of fact, and some of the ALJ's discussion, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order because I disagree with much of the ALJ's discussion.[19]

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[19] I also agree with the ALJ's Order dismissing Petitioner's Petition (Initial Decision and Order at 38). Petitioner filed its Petition on February 17, 1998. On August 12, 1998, Petitioner filed its Motion to Amend Petition and Amended Petition. On September 10, 1998, the ALJ granted Petitioner's Motion to Amend Petition and accepted Petitioner's Amended Petition (Ruling on Motion to Amend). I infer that Petitioner withdrew its Petition and substituted in its stead Petitioner's Amended

VI. Applicable Statutory and Regulatory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating the handling of commodity

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and paying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the

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Petition. Therefore, I find that the ALJ's dismissal of Petitioner's Petition is error. Instead, I dismiss Petitioner's Amended Petition (Decision and Order, *infra*).

President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

7 C. F. R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE

(MARKETING AGREEMENTS AND ORDERS; MILK)

DEPARTMENT OF AGRICULTURE

. . . .

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

Subpart—Order Regulating Handling

. . . .

DEFINITIONS

. . . .

§ 1001.10 Producer-handler.

Producer-handler means any person who, during the month, is both a dairy farmer and a handler who meets all of the following conditions:

35. Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001. 10(a).

VII. Findings of Fact

1. Petitioner is a "handler," as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9), and at all times material to this proceeding, Petitioner operated as a handler (Tr. 44-45, 51, 133, 142-44, 178-79, 260).

2. Petitioner is a partnership which has operated a grocery business since 1969. Petitioner is engaged in the business of selling milk and other dairy and food products to consumers at retail food stores in Norwalk and Danbury, Connecticut, with a principal place of business located at 100 Westport Avenue, Norwalk, Connecticut. (Amended Pet. ¶¶ 1-2, 4.)

3. At its retail food store in Norwalk, Connecticut, Petitioner distributes fluid milk products processed at its fluid milk processing plant located on the same premises. At a second retail food store in Danbury, Connecticut, Petitioner distributes fluid milk products

processed at the Norwalk fluid milk processing plant. (Tr. 22-23.)

4. Petitioner's Norwalk, Connecticut, retail food store and fluid milk processing plant is owned by a partnership consisting of Marianne Leonard and the Marianne Leonard 1993 Trust (PX 1; Tr. 21-22). Petitioner has no ownership interest in the Danbury, Connecticut, retail food store through which it distributes a portion of the fluid milk products processed at its Norwalk fluid milk processing plant. The Danbury, Connecticut, store is owned by a limited liability corporation whose ownership is divided among various members of the Leonard family other than the partnership owners of Petitioner. (PX 1; Tr. 22-25.)

5. Petitioner represents itself as operating the world's largest dairy store (Tr. 128). Petitioner receives and processes about two-thirds of a tanker truck of milk each day and sells approximately 1.2 million gallons of milk per year (Tr. 119, 493-94).

6. Prior to January 1, 1998, Petitioner received its entire raw milk supply from Agri-Mark, Inc., a cooperative association, whose dairy farmer members supply milk to handlers regulated by the New England Milk Marketing Order (Tr. 215-16).

7. Oakridge Farm is a dairy farm in Ellington, Connecticut, which owns approximately 550 cows (Tr. 56-57). Prior to January 1, 1998, Oakridge Farm was a member of Agri-Mark, Inc. (Tr. 210).

8. Oakridge Farm is owned by Atlas Associates, a partnership whose partners, according to public records in Ellington, Connecticut, are Corbin Bahler, Kenneth Bahler, and S. Owen Bahler. There is a second certificate which lists Atlas Associates, d/b/a Oakridge Farm. (Tr. 267.)

9. Bahler Farms, Inc., is a corporation that operates a dairy farm which is contiguous to Oakridge Farm (Tr. 102, 267).

10. Vern Bahler is the president and a director of Bahler Farms, Inc.; David Bahler is the secretary and a director of Bahler, Farms, Inc.; and Corbin Bahler is the agent for Bahler Farms, Inc. (Tr. 267). Petitioner has no interest in Bahler Farms, Inc. (Tr. 48).

11. On December 10, 1997, Kenneth Bahler, as "Partner" on behalf of Oakridge Farm and Stewart J. Leonard, Jr., as "President" on behalf of Petitioner, executed a document entitled "Lease Agreement." Pursuant to the Lease Agreement, Petitioner agreed to: (1) lease Oakridge Farm's entire herd of milking cows, barns, milking parlors, personal property, and all equipment necessary to produce raw milk and its related products; (2) transport the milk products from Oakridge Farm to Petitioner's facilities for processing, packaging, sale, and distribution at its own expense; (3) pay for all ordinary and necessary expenses relating to production, processing, and packaging of milk and its related products; (4) pay Bahler Farms, Inc., a management fee; and (5) buy corn silage from Bahler Farms, Inc. (PX 2.)

12. On December 18, 1997, Petitioner notified the Market Administrator that Petitioner had entered into an agreement to receive milk directly from Oakridge Farm with the intention of becoming a producer-handler. On December 30, 1997, the Market Administrator responded to Petitioner's letter by quoting the requirements in 7 C.F.R. § 1001.10 for producer-handler status under the New England Milk Marketing Order and by advising Petitioner that the versions of the proposed lease agreement with "Bahler Oak Ridge Farm" that had been provided to the Market Administrator's office, failed to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

Stewart J. Leonard
100 Westport Avenue
Norwalk, CT 06851-3999

Gentlemen:

We have received your letter dated December 18, 1997 stating that you have entered into an agreement to receive milk directly from the Bahler Oak Ridge Farm and that your intention is to become a producer-handler.

Section 1001.10 of Federal Order No. 1 requires in part that a producer-handler *"provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition."*

We have discussed this matter on several occasions during the past four months. To date, the versions of the proposed lease agreement between Stew Leonard's Dairy and the Bahler Oak Ridge Farm which you have provided to this office have failed to meet the order requirements.

The status of Stew Leonard's Dairy will not be changed to that of a producer-handler until you submit for review and approval a signed copy of the lease which fully meets the requirements of section 1001.10.

> Stew Leonard's Dairy will continue to be a pool handler and file monthly Form 1 reports and make equalization payments into the New England Market Order pool.

PX 10 (emphasis in original).

13. On January 5, 1998, Petitioner's counsel sent a copy of the executed December 10, 1997, Lease Agreement to the Market Administrator with a letter requesting that the Market Administrator identify the manner in which the lease fails to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

> Mr. Erik F. Rasmussen
> Market Administrator
> U.S. Department of Agriculture
> P.O. Box 1478
> Boston, MA 02205-1478
>
> Re: **Stew Leonard's Dairy Store**
>
> Dear Mr. Rasmussen:
>
> This office represents Stew Leonard's Dairy of Norwalk, Connecticut. We are in receipt of your letter dated December 30, 1997 addressed to Stewart J. Leonard in which you state that the lease between Stew Leonard's Dairy Store and Bahler Oak Ridge Farm fails to meet the requirement of Section 1001.10 of Federal Order No. 1.
>
> I am enclosing a copy of the signed lease as requested. Would you please advise in what respects the lease fails to meet the requirements of the aforesaid Federal order.

We will consider your comments and take such steps as we deem appropriate.

PX 12.

14. On January 15, 1998, the Market Administrator responded, advising Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, as follows:

Robinson & Cole LLP
One Commercial Plaza
280 Trumbull Street
Hartford, CT 06103-3597

Attention: Mr. James A. Wade

Gentlemen:

We have reviewed the copy of the signed lease agreement between Stew Leonard's Dairy and Oakridge Farm of Ellington, Connecticut.

As written, the proposed lease fails to meet the Order requirement that the handler *"provides as the person's own enterprise and risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route distribution."*

Specifically, Paragraph 3 states that the parties "agree to review and adjust the payments called for herein on a quarterly

basis." This provision, in effect, eliminates any risk of loss to Stew Leonard's Dairy as a result of "uncertainties that relate to the cost of farming." Such risk is inherent to a producer-handler's operation and must be assumed by Stew Leonard's Dairy before that handler's status is changed to that of a producer-handler.

In addition, the fixed amount and the frequency of the management fee to be paid to Bahler Farms, Inc., by Stew Leonard (also noted in Paragraph 3) must be specified in the lease.

PX 11 (emphasis in original).

15. On January 20, 1998, Petitioner's counsel sent a letter and a proposed new lease between Petitioner and Oakridge Farm to the Market Administrator inquiring whether Petitioner would meet the requirements for a producer-handler if it re-executed the December 10, 1997, lease with Oakridge Farm with modifications indicated on the proposed lease, as follows:

Mr. Erik F. Rasmussen
Market Administrator
U.S. Department of Agriculture
P.O. Box 1478
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy Store**

Dear Mr. Rasmussen:

Enclosed please find a copy of the lease between Stew Leonard's and Oakridge Farm which incorporates the changes thereto

suggested in your letter of January 15, 1998. Assuming the parties re-execute the lease with these modifications therein, will that meet the requirements of the Federal Milk Order? Please advise at once and I will take the necessary steps to have the lease re-executed and forward a signed copy to you.

PX 13.

16. On February 6, 1998, the Market Administrator notified Petitioner by letter that he had reviewed the various leases that Petitioner had proposed to change its status from a handler under the New England Milk Marketing Order to a producer-handler, exempt from the regulatory provisions applicable to handlers. The letter states that, in contrast to currently operating producer-handlers who meet the regulatory requirements for producer-handler status under the New England Milk Marketing Order, Petitioner proposes a legal construct merely to circumvent the AMAA, as follows:

Stew Leonard's Dairy
100 Westport Avenue
Norwalk, CT 06851-3999

Dear Mr. Leonard:

This office has reviewed the various leases you have proposed. The stated purpose of the leases is to change the regulatory status of Stew Leonard's Dairy from a handler operating a pool distributing plant that purchases pool milk from producers to status as a producer-handler.

> There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes.
>
> The situation at Stew Leonard's Dairy is distinct from proposals received by some producer-handlers. You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S.C. 608(c)(5) [sic]. The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.
>
> Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision, refer to 7 U.S.C. (608)(c)(15)(A) [sic].

PX 14.

17. On February 17, 1998, Petitioner filed its Petition, seeking relief from the Market Administrator's February 6, 1998, determination that Petitioner's December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner (Pet.).

18. In response to the Market Administrator's comments in his January 15, 1998, letter (PX 11), Petitioner executed a new Lease Agreement with Oakridge Farm on June 16, 1998 (PX 3, PX 13, PX 15).

19. Vern Bahler, as "Partner" on behalf of Oakridge Farm and Stew Leonard, Jr., as "President" on behalf of Petitioner, executed the June 16, 1998, Lease Agreement. The Lease Agreement contains the following operative terms:

1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew Leonard's agrees to replace culls and/or attrition with newly bred heifers.
2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.
3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing

and packaging of milk. Also, Stew Leonard's agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice, 60 days prior to change, is required in the event of any change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

PX 3.

20. On June 22, 1998, Petitioner's counsel sent a letter and a copy of the June 16, 1998, lease between Petitioner and Oakridge Farm to the Market Administrator, requesting that the Market Administrator determine that Petitioner is a producer-handler under the New England Milk Marketing Order based on the June 16, 1998, lease, as follows:

Mr. Erik F. Rasmussen
Market Administrator
U.S. Department of Agriculture
P.O. Box 1478
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy**

Dear Mr. Rasmussen:

As requested by Attorney Don Tracy during a telephone conversation with Joan Grear of my office, enclosed please find a copy of the revised and executed lease between Stew Leonard's and Oakridge Farm. We understand from Mr. Tracy that the enclosed lease together with the Grade A Milk Production License issued by the State of Connecticut, will provide you with sufficient basis to confirm Stew Leonard's designation as a producer-handler.

Mr. Tracy also told Joan Grear that upon your receipt of the enclosed lease, we could expect to receive a letter from you confirming the producer-handler designation. We would appreciate it if you would forward same at your earliest convenience. We will withdraw our 15(A) petition upon our receipt of documentation confirming the producer-handler designation.

PX 15.

21. On July 31, 1998, the Market Administrator notified Petitioner's counsel that the June 16, 1998, lease between Petitioner and Oakridge Farm did not alter the

Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order, as follows:

> Mr. James A. Wade
> Robinson & Cole LLP
> One Commercial Plaza
> 280 Trumbull Street
> Hartford, CT 06103-3597
>
> Dear Mr. Wade:
>
> I have received your letter dated June 22, lease agreement, and Grade A Milk Production License. A review of this additional information has not altered the determination of February 6 that Stew Leonard's Dairy is not a producer-handler.
>
> Please continue to have your client file handler reports and producer payrolls as they have in the past.

PX 16.

22. On August 12, 1998, Petitioner filed its Amended Petition, seeking relief from the February 6, 1998, notice, and continuing determination by the Market Administrator that Petitioner is not a producer-handler under the New England Milk Marketing Order (Amended Pet.).

23. Since leasing Oakridge Farm's milking cows and milk production facilities. Petitioner has paid the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinary services, and services to keep track of animals (Tr. 188-90). Petitioner has purchased insurance to cover its obligations with respect to Oakridge Farm, with a policy providing a benefit of

$1 million per occurrence, $2 million per year, and with an umbrella benefit of $45 million per year (Tr. 498-99).

24. Oakridge Farm and Bahler Farms, Inc., are operated jointly in that they "share equipment and a full-time calf raiser, a mechanic and full-time milkers" (Tr. 102, 266-68).

25. Vern Bahler and Dave Bahler, who operate Bahler Farms, Inc., have check-writing authority for Oakridge Farm (Tr. 97-98).

26. The Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04).

27. Records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69).

28. Oakridge Farm and Bahler Farms, Inc., share the financial risk of a loan for which they jointly pledged security to First Pioneer Farm Credit (Tr. 269).

29. Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71).

30. Petitioner has no leasehold or other interest in the actual farmland of Oakridge Farm (PX 3).

31. Every producer-handler in the New England Milk Marketing Order is a dairy farmer who owns a dairy farm (Tr. 252).

32. Of the 20 producer-handlers in the New England Milk Marketing Order, three have leased extra cows and milk production facilities to increase their milk production by no more than 25 per centum (Tr. 252-54). The terms of these leases are reflected in PX 9, PX 17, and PX 18. The Market Administrator permits these three enterprises, which were producer-handlers at the time they entered into their respective leases, to obtain up to 25 per centum of their milk from leased cows without jeopardizing their status as producer-handlers (Tr. 253). The Market Administrator concedes these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and

management of the leased cows and other resources and facilities used to produce the milk from the leased cows (Tr. 317, 425, 441).

33. Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145).

34. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-45, 250). Petitioner would have avoided, if it had been a producer-handler, payments as high as 37 cents per gallon (RX C; Tr. 247-52). If Petitioner were a producer-handler, Petitioner would have as much as a 25-cent per gallon advantage over its competitor, Stop & Shop Supermarket Companies. Differences of less than one cent per gallon can have a competitive impact in the dairy industry. (Tr. 451-52, 482-85.)

35. The competitive advantage to Petitioner, described in Findings of Fact No. 34, would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing area[20] (Tr. 245).

36. The quality control that Petitioner seeks by leasing Oakridge Farm's milking cows and milk production facilities are completely independent of Petitioner's status. As a handler, Petitioner has accomplished its desired quality control goals while accounting to the pool for the use of its milk. (Tr. 50-51, 54-55, 93-96, 171-72, 258-59.)

37. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated

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[20] The term "New England marketing area" is defined in 7 C.F.R. § 1001.2.

Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.)

38. The record establishes that the Market Administrator's determination was in accordance with law.

39. The record does not establish that Petitioner is a dairy farmer.

40. The record does not establish that Petitioner provides, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of Oakridge Farm's dairy herd and Oakridge Farm's resources and facilities used to produce milk.

41. The record does not establish that Petitioner is a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

VIII. Discussion

A. The Issue

The issue to be resolved in this proceeding is whether the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Petitioner now obtains its entire milk supply by leasing milking cows and milk production facilities and maintains that it is now producing and processing milk as its own enterprise and at its own risk, as required for producer-handler status. Respondent denies that Petitioner operates a dairy farm as its own enterprise and at its own risk.

B. The Burden of Proof

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner, and in order to prevail in this proceeding, Petitioner has the burden of proving that the Market Administrator's determination

that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not in accordance with law.[21] I find

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[21] *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F.Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Jet Farms, Inc.*, 50 Agric. Dec. 13, 73, 1406 (1991); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 140 (1977); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms, Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Fitchett Bros., Inc.*, 34 Agric. Dec. 1, 3 (1975); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973); *In re Hawthorn-Mellody, Inc.*, 30 Agric. Dec. 1774, 1791-92 (1971); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 191 (1968), *aff'd, Neugebauer v. Secretary of Agriculture*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Dade County Dairies, Inc.*, 24 Agric. Dec. 1567, 1571 (1965); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965); *In re Cecil Duncan*, 19 Agric. Dec. 1110, 1115 (1960); *In re Newark Milk & Cream Co.*, 18 Agric. Dec. 211, 214 (1959), *aff'd, Newark Milk & Cream Co. v. Benson*, Civil Action No. 242-59 (D.N.J. Dec. 30, 1959),

that Petitioner has not met its burden. Moreover, the evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41). Thus, Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

C. The Historical Necessity For Milk Market Regulations Dictate That Producer-Handler Status Is An Exception To Be Strictly Construed

Milk market regulations are rooted in two characteristics: (1) fluid milk commands a higher price than milk put to other uses, even though the quality of the milk is the same; and (2) milk production varies with the season, so that a herd of cows large enough to meet consumer demand in the winter will, in the more productive warmer months, produce an oversupply of milk. *Zuber v. Allen*, 396 U.S. 168, 172-73 (1969). Prior to regulation, milk processors were able to demand bargain prices during the summer. Milk producers increased production to maintain their income and a disequilibrium snowballed. In response, Congress enacted a series of laws ending with the AMAA, which is the statutory basis for the price regulation involved in this proceeding. One goal of price regulation is to discourage cutthroat competition among milk producers to sell their milk for use as fluid milk. *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939). The AMAA and the New England Milk Marketing Order are designed to achieve a fair

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printed in 19 Agric. Dec. 54 (1960); *In re Valley Creamery Co., Inc.*, 13 Agric. Dec. 979, 981 (1954); *In re M.H. Renken Dairy Co.*, 11 Agric Dec. 264, 272 (1952); *In re St. Charles Dairy*, 7 Agric. Dec. 943, 946 (1948).

division of the more profitable fluid milk market among all milk producers, thus eliminating the disequilibrium which had been a consequence of cutthroat competition among milk producers striving for the fluid milk market. By use of equalization payments, milk producers receive the same price regardless of the ultimate use to which their milk is put. The procedure for achieving equalization generally is that the market administrator computes the value of milk used by each handler by multiplying the quantity of milk the handler uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to milk producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than that handler's total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than that handler's total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus, a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

Most handlers are fully regulated by milk marketing orders. However, some milk producers process the milk which they produce. A milk producer which is also a handler of the milk which it produces and which strictly conforms to the definition of "producer-handler," under the milk marketing order that is applicable to that milk producer, is exempt from a number of the milk marketing order provisions applicable to fully regulated handlers. Historically, producer-handlers were normally "family-type" operations (25 Fed. Reg. 5494 (1960); 25 Fed. Reg. 7825 (1960)). Customarily, a producer-handler has a relatively small operation, is operating in a self-sufficient manner, and

is not a major competitive factor in the market for regulated handlers. The milk that is processed, packaged, and distributed by a producer-handler is obtained from the producer-handler's own production. Any fluctuation in a producer-handler's milk needs is met through the producer-handler's own production, and the producer-handler disposes of any excess milk supply at his or her own expense.[22]

The Secretary of Agriculture could elect to fully regulate producer-handlers under the AMAA. The exemption allowed producer-handlers arises not from the lack of authority under the AMAA to regulate producer-handlers, but from the determination that full regulation of a handler meeting the definition of a producer-handler is not necessary to achieve the declared policy of the AMAA in the marketing area.[23] Producer-handler status is an exception to the general regulatory framework of the AMAA, and therefore, it must be strictly construed.[24] In

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[22] *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805, 850 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 63-64 (1995).

[23] *See Freeman v. Vance*, 319 F.2d 841 (5th Cir. 1963) (per curiam), *cert. denied*, 377 U.S. 930 (1964); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3d Cir. 1961) *cert. denied*, 372 U.S. 965 (1964); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 141-42 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 992-93 (1974); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 963 (1972); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 192 (1968), *aff'd, Neugebauer v. Secretary of Agricultur*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Independent Milk Producer-Distributors' Ass'n*, 18 Agric. Dec. 881, 882-83 (1959) (Denial of Interim Relief); *In re Benbush Dairy*, 17 Agric. Dec. 1185, 1188 (1958); *In re Acme Breweries, Inc.*, 9 Agric. Dec. 1418, 1427-30 (1950), *aff'd, Acme Breweries v. Brannan*, 109 F. Supp. 116 (N.D. Cal. 1952).

[24] *In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yasgur Farms. Inc.*, 33 Agric. Dec. 389, 405

order to obtain producer-handler status, a petitioner must strictly comply with the definition of "producer-handler" in the milk marketing order that is applicable to that petitioner. The evidence in this proceeding does not establish that Petitioner is a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10). The evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41).

D. The Market Administrator's Determination is Accorded Deference

An administrative agency's interpretation of its own regulations must be accorded deference in any administrative or court proceeding, and an agency's construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.[25]

The Market Administrator is the official responsible for administering the New England Milk Marketing Order, and the Market Administrator is specifically authorized to make rules and regulations to effectuate the terms and provisions of the New England Milk Marketing Order (7 C.F.R. § 1000.3(b)(2); Tr. 234). The Market Administrator has been working with milk marketing orders for 25 years

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(1974); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

[25] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993), *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*; 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

and has been the New England Milk Marketing Order market administrator for 9 years (Tr. 231-34). The Market Administrator makes monthly determinations regarding the producer-handler status of enterprises regulated under the New England Milk Marketing Order (Tr. 241-43).

It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.[26]

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc v. Wickard,* 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

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[26] *Lawson Milk Co. v. Freeman,* 358 F.2d 647, 650 (6th Cir. 1966); *In re Mil-Key Farm. Inc.,* 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.,* 49 Agric. Dec. 1, 19 (1990); *In re Conesus Milk Producers,* 48 Agric. Dec. 871, 876 (1989); *In re Echo Spring Dairy, Inc.,* 45 Agric. Dec. 41, 58-60 (1986); *In re County Line Cheese Co.,* 44 Agric. Dec. 63, 87 (1985), *aff'd,* No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd,* 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich,* 36 Agric. Dec. 133, 137 (1977); *In re Associated Milk Producers, Inc.,* 33 Agric. Dec. 976, 982 (1974); *In re Yasgur Farms, Inc.,* 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.,* 32 Agric. Dec. 1004, 1055-56 (1973), *aff'd,* 369 F. Supp. 632 (S.D.N.Y. 1973).

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

Therefore, I give considerable weight to the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order.

E. The Market Administrator's Determination Is Consistent With Purpose of the Regulation Defining "Producer-Handler"

The definition of the term "producer-handler," in what subsequently became the New England Milk Marketing Order, was amended on August 31, 1960, by adding the requirement that "the maintenance, care and management of the dairy herd and other resources and facilities necessary to produce the milk . . . [must be] the personal enterprise and risk of such person" (25 Fed. Reg. 8283, 8285 (1960)). This amendment was preceded by a Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, and published on June 18, 1960 (25 Fed. Reg. 5488 (1960)), and by a Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Acting Secretary, United States Department of Agriculture, and published on August 16,

1960 (25 Fed. Reg. 7819 (1960)). Both of these *Federal Register* publications describe the purpose of the amendment, as follows:

> In order to maintain producer-handler status, it is provided that the maintenance, care and management of the dairy animals and other resources necessary to produce the milk, and the processing, packaging and distribution of the milk shall be the personal enterprise of and the personal risk of the person involved. These standards are intended to distinguish the family-type operation normally involved, and to bring under full regulation operations which attempt to masquerade as those of[27] producer-handlers in their normal concept through leases, rental arrangements, and other devices designed to circumvent regulation by the order.

25 Fed. Reg. At 5494; 25 Fed. Reg. At 7825.

Petitioner represents itself as operating the world's largest dairy store, Petitioner receives and processes about two-thirds of a tanker truck of milk each day, and Petitioner sells approximately 1.2 million gallons of milk per year (Tr. 119, 128, 493-94). Petitioner is not a small operation, but, small operations are generally characteristic of producer-handlers. Moreover, Petitioner is engaging in the very

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[27] The words "those of" appear in the Acting Secretary's Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders (25 Fed. Reg. 7819, 7825 (1960)), but do not appear in Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture (25 Fed. Reg. 5488, 5494 (1960)).

activity which the "own enterprise" and "own risk" amendment is designed to prevent; *viz.*, Petitioner is posing as a producer-handler through a lease to circumvent regulation as a handler under the New England Milk Marketing Order.

F. The Market Administrator's Determination Is Consistent With Prior Cases

This case is another in a long line of cases in which handlers have sought to avoid full regulation under milk marketing orders by leases and other devices employed to claim producer-handler status. The Judicial Officer and the courts have consistently upheld determinations by market administrators that leases and similar devices do not create producer-handler status.[28] Although the cases do not explicitly state that leases can never create producer-handler status, the overall rationale of these cases is that leases and similar devices do not create producer-handler status.

Petitioner relies on *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in support of its contention that its lease of Oakridge Farm's milking cows and milk production facilities qualifies Petitioner as a producer-handler under

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[28] *See United States v. Elm Spring Farm, Inc.*, 38 F. Supp. 508 (D. Mass. 1941), *aff'd*, 127 F.2d 920 (1st Cir. 1942); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986); *In re Pleasant View Farms, Inc.*, 36 Agric. Dec. 1262 (1977); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm, Inc.*, 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964), *aff'd, Brown v. United States*, 367 F.2d 907 (10th Cir. 1966); *In re Eugene M. Olson*, 22 Agric. Dec. 877 (1963); *In re John Velozo*, 5 Agric. Dec. 739 (1946); *In re Martin & Costa*, 4 Agric. Dec. 636 (1945); *In re Antone Amaral*, 3 Agric. Dec. 367 (1944); *In re Henshaw*, 1 Agric. Dec. 721 (1942); *In re Martin S. Cosgrove & Sons, Inc.*, 1 Agric. Dec. 510 (1942), *aff'd, Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Martin S. Cosgrove*, 1 Agric. Dec. 503 (1942), *aff'd, Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943).

the New England Milk Marketing Order (Petitioner's Post-Hearing Brief at 12-17).

Petitioner's reliance on *Klocker* is misplaced. The facts in *Klocker* bear no resemblance to the facts presented in this proceeding. In *Klocker*, the Judicial Officer held that the petitioner, who was a producer-handler under a milk marketing order, did not lose his producer-handler status by reason of a contract in which the petitioner sold and leased back his dairy herd and hired the lessor as his employee, due to the unique facts presented and the setting in which the contract was created. In arriving at such conclusion, the Judicial Officer stated:

> We do not have here any elements of a sham transaction to effect a bogus producer-handler status. *Cf., e.g., Elm Spring Farm, Inc. v. United States, supra.* Admittedly, the use of milk from a ~~leased~~ herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

In re Jerome Klocker, supra, 26 Agric. Dec. at 1057.

Unlike the petitioner in *Klocker,* Petitioner in this proceeding never owned a dairy farm, does not know how to operate a dairy farm (Tr. 145), was not a producer-handler at the time Petitioner leased Oakridge Farm's milking cows and milk production facilities (Tr. 44-45, 51, 133, 142-44, 178-79, 260), and never managed or operated Oakridge Farm (Tr. 93).

The case law also supports the proposition that a handler does not achieve producer-handler status if the handler merely engages in a sham transaction designed to circumvent the milk pricing regulations or if the lessee fails to assume the risks of milk production. *See, e.g., In re Sherman Fitzgerald,* 31 Agric. Dec. 593, 604-05 (1972) ("In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation."). For example:

- In *Elm Spring Farm, Inc. v. United States,* 127 F.2d 920 (1st Cir. 1942), a handler "purchased" cows from various sellers, but paid for the cows with a combination of promissory notes and stock, and the "sellers" were entitled to "repurchase" the cows under liberal terms. 127 F.2d at 923. The "sellers" agreed under separate contracts to maintain the cows and deliver milk to the handler and further guaranteed that the cost of producing milk, including the expense of cattle illness or death, would not exceed the blend price plus a specified figure. *Id.* The court called this scheme an "elaborate camouflage" in which the handler "avoid[ed] the risks of production." *Id.* At 927. *See also Cosgrove v. Wickard,* 49 F. Supp. 232 (D. Mass. 1943) (invalidating a similar scheme in which cows were "purchased" with a small cash payment and substantial note on which no payments were made and where the only payments made on a purported lease were based on the quantity and butterfat content of milk produced).

- In *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986), the petitioner leased a farm, but had a joint checking account with the lessor and various related businesses, including two other dairy farms, which thereby pooled their resources. *Id.* At 45. The lessor controlled the bank account. *Id.* The ledger sheet of Echo Spring did not reflect whether it had withdrawn more from the account than it had deposited, or vice versa, and Echo Spring frequently withdrew more than it deposited. *Id.* At 44, 46. The lease payments by Echo Spring were made from the same checking account, *Id.* At 47, meaning the related businesses subsidized Echo Spring's lease payments.
- In *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972), the Judicial Officer denied a petition for producer-handler status where the petitioner claimed to be purchasing a herd at Bringhurst farm and claimed that the operation of the milk production facilities was under the petitioner's control. *Id.* At 954. The evidence showed, however, that the petitioner merely accepted milk from the farm, never agreed to a purchase price, and never identified the cows to be "purchased." *Id.* At 954-55. Furthermore, "Petitioner carried no insurance on the cows or on any of the equipment on the Bringhurst farm [and] Petitioner gave Bringhurst no instruction on feeding or caring for the cows." *Id.* At 955.
- In *In re Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (1970), the Judicial Officer found that the petitioner was not a producer-handler where the petitioner leased cows that were delivered to the petitioner's property during lactation and returned when they stopped lactating. In that case, the petitioner was not responsible for loss of cows and, when the cows were not on the petitioner's property, the petitioner took no interest in their breeding, care, sale, or health. *Id* at 1008-09.

> [I]t is plain that the dairy farmers who own the cows suffer the risks of the cows going dry and dying even

> when the cows are under lease and on the petitioner's premises. Too, the petitioner has no responsibilities for the care of the cows, the breeding of the cows, the health of the cows or any other risk involving the cows when they are not under lease and being fed and milked at petitioner's dry lot.

Id. At 1010.

- In *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964), the Judicial Officer denied a petition for producer-handler status where the petitioner "purchased" an undivided one-tenth interest in cows for $15 per cow, under an arrangement that would return the $15 to the petitioner upon the sale of each cow. *Id* at 22-23. The petitioner obtained the absolute right to all milk produced by the cows, which staved in the possession of the majority owner, and the petitioner paid the majority owner a fee "for the services required" that was the same as the price of milk. The Judicial Officer noted that the petitioner assumed no risk, since the $15 fee per cow would be returned. The Judicial Officer stated:

> The record as a whole and the contracts relied upon by petitioners *even if accepted at face value* indicate that petitioners do not operate a dairy farm and do not bear any risk of producing the milk handled by them and that the production facilities, as distinguished from the milk processing facilities, are not the personal enterprise of petitioners.

Id. At 27-28.

Elm Spring Farm, Inc. v. United States, supra; Cosgrove v. Wickard, supra; In re Echo Spring Dairy, Inc., supra; In re Clyde Lisonbee, supra; In re Willow Crossing Dairy Farm, supra; and *In re Fred A. Brown, supra,* all support the proposition that a handler that tries to circumvent the milk pricing

regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not obtain producer-handler status.

The record establishes that Petitioner leased Oakridge Farm's milking cows and milk production facilities for the purpose of changing its status from that of a fully regulated handler to that of a producer-handler exempt from the provisions of the New England Milk Marketing Order applicable to fully regulated handlers. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.) Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145). Petitioner did not become a dairy farmer by virtue of its lease of Oakridge Farm's milking cows and milk production facilities, and I conclude that Petitioner is a handler that is trying to circumvent the provisions of the New England Milk Marketing Order applicable to fully regulated handlers by claiming to lease milking cows and milk production facilities, while in reality simply buying milk from Oakridge Farm. Under these circumstances, Petitioner is not a producer-handler under the New England Milk Marketing Order.

There are no cases precisely on point to support the proposition that a handler, which leases a dairy farm, dictates the essential elements of the dairy farm's management, and assumes substantially the entire risk of dairy farming, is nevertheless still not a producer-handler. Respondent maintains Petitioner was not operating "at its own risk" because there were numerous risks not assumed or borne by Petitioner in that Petitioner had no interest in the land and anything that happened to the land (such as toxic waste) was at the risk of the dairy farm owner.

Moreover, Respondent argues that the capital risk inherent in property ownership remains with the Bahlers. (Respondent's Post-Hearing Brief at 10.)

In December of 1997, Petitioner entered into a lease with Oakridge Farm, an approximately 550-cow dairy farm in Ellington, Connecticut, operated by Vern Bahler and members of his family (PX 2). The operative lease, which is a modification of the December 1997 lease, was signed on June 16, 1998. The lease was for the milking cows and milk production facilities of Oakridge Farm. Specifically, Petitioner leased the herd of milking cows, barns, milking parlors, personal property, and "all equipment necessary to produce raw milk and its related products" (PX 3 ¶¶ 1-2). Petitioner also agreed to pay all ordinary and necessary expenses related to the production of milk and "to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor" (PX 3 ¶ 3). The risk and responsibility "include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance" (PX 3 ¶3). The lease has a term of 2 years (PX 3 ¶ 4).

Petitioner argues that the lease of Oakridge Farm's milking cows and milk production facilities imposes on Petitioner every identifiable expense of dairy farming, from labor costs to building maintenance and also every risk of dairy farming, whether identified in the lease or not. Under the lease, Petitioner dictates all crucial elements of the operation of the enterprise. (Petitioner's Post-Hearing Brief at 9.)

Sample invoices demonstrate that Petitioner pays the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinarian services, and services to keep track of animals (Tr. 188-89). Petitioner also maintains liability insurance on Oakridge Farm, with a benefit of $1 million per occurrence and $2 million per year,

plus an umbrella policy with a benefit of $45 million (Tr. 498-99).

Respondent maintains that Petitioner's relationship with Oakridge Farm is effectively "no different than the ordinary relationship between a handler buying milk from producers" (Respondent's Post-Hearing Brief at 13). All of the conditions of the purchase of milk are ones for which any handler may contract with any milk producer. The evidence was uncontroverted that the operation of Oakridge Farm did not change after the lease. The Bahlers operated Oakridge Farm before the execution of the lease and they operated Oakridge Farm after the execution of the lease (Tr. 93). The record does not contain any evidence indicating that Petitioner ever took over operation of the Oakridge Farm milk production facilities. After the June 16, 1998, lease, the Bahlers retained complete control over the operation of Oakridge Farm milk production facilities, including the maintenance, care, and management of the Oakridge dairy herd and other Oakridge Farm resources and facilities that are used to produce milk. Under these circumstances, Petitioner's June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities is not consistent with the "dairy farmer," and "own enterprise" requirements in the definition of "producer-handler" in the New England Milk Marketing Order.

Respondent also maintains that the lease fails to support Petitioner's contention that it is a producer-handler because the connections between Oakridge Farm and Bahler Farms, Inc., invalidate any effort at producer-handler status, independent of the principle that a handler cannot become a producer-handler merely by leasing a herd of cows (Respondent's Post-Hearing Brief at 10).

The Bahlers own and operate two contiguous farms, Oakridge Farm and Bahler Farms, Inc. (Tr. 56, 102, 267). Petitioner has no role in the operation of and no interest in Bahler Farms, Inc. (Tr. 48). Therefore, to the extent that Bahler Farms, Inc., and Oakridge Farm are operated jointly,

Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk.

The record establishes that Oakridge Farm and Bahler Farms, Inc., share equipment, a full-time calf raiser, a mechanic, and full-time milkers (Tr. 102, 266-68); the Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04); the records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69); Oakridge Farm and Bahler Farms, Inc., jointly share the financial risk of a loan for which they pledged security to First Pioneer Farm Credit (Tr. 269); and Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71). Since Oakridge Farm is operated, in part, by Bahler Farms, Inc., an entity in which Petitioner has no interest, Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk. Thus, Petitioner is not a "producer handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Petitioner maintains that the Market Administrator's decision that Petitioner is not a producer-handler is arbitrary, capricious, and an abuse of the Market Administrator's administrative authority. Petitioner claims that the Market Administrator's determination denied Petitioner equal protection of the laws and due process because Petitioner contends it has demonstrated that it has assumed the full risk of dairy farming and the Market Administrator has granted producer-handler status to others (already producer-handlers) who have leased farms but plainly assumed less of the risk of dairy farming than has Petitioner. (Petitioner's Post-Hearing Brief at 18-28, 38-41.)

Additionally, Petitioner notes that the Market Administrator admitted that the term "dairy farmer" is not defined anywhere in the New England Milk Marketing Order (Tr. 298); thus, making the Market Administrator the sole power to decide what is and is not a dairy farmer (Petitioner's Post-Hearing Brief at 10 n.5).

The Market Administrator based his decision that Petitioner was not a producer-handler on the definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), which requires that, in order to be a producer-handler, a person must be both a dairy farmer and a handler who provides, as the person's own enterprise and at the person's own risk, the maintenance, care, and management of a dairy herd and other resources and facilities that are used to produce milk.

The Market Administrator has permitted three enterprises to lease cows and milk production facilities and retain their designations as producer-handlers, even though these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (Tr. 317, 425, 441).

In one instance, a dairy farmer and milk processor retained its producer-handler status despite the existence of three leases pursuant to which the dairy "will be leasing [redacted] head of cattle ... and [redacted] cattle barn(s)" and "will be responsible for all bills related to the feed, health care and management of the said [redacted] cattle." (PX 9(a), 9(b), and 9(c)). Each lease is terminable by either party on 30 days' notice. *Id.* The leases do not contain any provision relating to risks associated with the farms, such as the risk that cows might perish, or that employees might cause harm, or that acts of God might cause damage. Rather, the lessee is responsible to pay only for feed, health care, and management.

The Market Administrator testified that a milk processor, such as the one involved in the leases in PX 9(a)-

(c), could obtain up to 25 per centum of its milk by way of such leases without jeopardizing its producer-handler status (Tr. 253). The Market Administrator conceded that the lessee had not assumed the full risks of the maintenance, care, and management of facilities used to produce milk, but nevertheless retained producer-handler status (Tr. 316-17). Therefore, the milk processor would be escaping significant risks relating to up to one-quarter of the farm operation that supplies its milk.

Another lease which did not cause the Market Administrator to remove the lessee's producer-handler status simply "assigned and transferred" milk produced on a dairy farm to the producer-handler that was leasing the cows (PX 17 Section II(c)). There is not even any pretense that the lessee is providing, as the lessee's own enterprise and at the lessee's own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk.

In the third lease, the lessee assumed the risk of loss or damage to milk and also agreed to indemnify the lessor against liability for injuries to workers, but did not otherwise assume the risks of the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (PX 18 at 1; Tr. 441).

The Market Administrator justified the distinction between Petitioner and the three other lessees by stating that the other lessees were producer-handlers prior to entering into leases and that they are limited to acquiring 25 per centum of their milk from leased cows (Tr. 252-55, 317, 427, 441). Unlike the three lessees, which have been allowed to retain their producer-handler status, Petitioner was not a producer-handler at the time it entered into the June 16, 1998, lease; Petitioner was not a dairy farmer at the time it entered into the June 16, 1998, lease; and Petitioner acquired 100 per centum of its milk supply from the milking cows and milk production facilities which Petitioner leased from Oakridge Farm.

While the three unidentified lessees arguably do not strictly conform to the definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), correction of their status would not be accomplished by designating Petitioner, who does not conform to the definition of "producer-handler," as a producer-handler.

IX. Petitioner's Appeal

Petitioner raises five issues in Petitioner's Appeal. First, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order is arbitrary and capricious (Petitioner's Appeal at 6-18).

I disagree with Petitioner's contention that the Market Administrator's determination, that Petitioner is not a producer-handler under the New England Milk Marketing Order, is arbitrary and capricious. As fully explicated in this Decision and Order, *supra*, the Market Administrator's determination carries out the purposes of the AMAA and the New England Milk Marketing Order, is consistent with other cases involving the lease of milk production facilities by handlers, and is supported by the facts. I conclude that the Market Administrator's determination is rational and that Petitioner failed to prove that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not in accordance with the law.

Second, Petitioner contends that the ALJ erroneously found that if Petitioner was recognized as a producer-handler under the New England Milk Marketing Order, Petitioner would have a competitive advantage over handlers of 25 to 37 cents per gallon of milk, which advantage would interfere with the orderly operation of the New England Milk Marketing Order. Petitioner points out

that there is evidence which supports a finding that Petitioner would, as a producer-handler, enjoy a competitive advantage over handlers, but Petitioner states the finding is based on such "thin evidence as to be unsupported" and the estimates of price advantage "do not account for the cost to Stew Leonard's of operating Oakridge Farm, and therefore have no relationship with the amount of money Stew Leonard's would save - if any - by becoming a handler." (Petitioner's Appeal at 11 n.4.)

The ALJ found, as follows:

> 33. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-245, 250). The payment amount that Petitioner would have avoided if it had been a producer-handler was as high as thirty-seven cents per gallon (RX-C; Tr. 247-252).
>
> 34. This advantage would interfere with the orderly operation of the Order and of the marketing of milk in Order No. 1. (Tr. 245).
>
> 35. If Petitioner were a producer-handler, it would have as much as a twenty-five cent per gallon advantage over his [sic] competitor, Stop & Shop. This is an industry where differences of less than one cent per gallon can have a competitive impact in this industry. (Tr. 452, 482, 484).

Initial Decision and Order at 10-11.

The record supports the ALJ's findings regarding competitive advantages that Petitioner would obtain if Petitioner were found to be a producer-handler and the

effect of that competitive advantage on the operation of the New England Milk Marketing Order (RX C; Tr. 244-52, 451-52, 482-85). Moreover, the record does not support a finding that Petitioner paid more for milk after it leased Oakridge Farm's milking cows and milk production facilities than Petitioner paid for milk before Petitioner executed the lease. I do not find that the ALJ's findings regarding potential competitive advantages to Petitioner were error, and I do not find that the ALJ erred by failing to find that Petitioner incurred costs in connection with Petitioner's lease which offset competitive advantages that Petitioner would have obtained had the Market Administrator determined Petitioner to be a producer-handler.

Third, Petitioner contends that case law supports Petitioner's Petition (Petitioner's Appeal at 18-24).

Petitioner cites only one case, *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in which the Judicial Officer concluded that a person who leased cows was a producer-handler. In all of the other cases cited by Petitioner, the Judicial Officer or the courts upheld market administrators' denials of producer-handler status.[29]

In *Klocker*, the Judicial Officer concluded that Klocker, who had been a *bona fide* producer-handler for a number of years, did not lose that status by reason of an April 1, 1964, lease of a dairy herd. Klocker had purchased a farm in 1949, started a dairy farm operation on the premises in 1955, and constructed a milk processing plant on the premises in 1956. The Judicial Officer found that Klocker had been the sole owner of all lands, buildings, machinery, equipment, and facilities of both the dairy farm and the milk processing plant since 1962. In addition, prior to April 1, 1964, Klocker owned 200 dairy cows located on

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[29] *Elm Spring Farm v. United States*, 127 F.2d 920 (1st Cir. 1942); *Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986); *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964).

the dairy farm. Then, on April 1, 1964, Klocker sold the dairy cows to Darrel Rausch and on the same day leased back the cows and employed Rausch as a farm employee. The cows were never removed from Klocker's premises and Klocker retained ownership of the equipment, buildings, and land devoted to the production of milk. *Id.* At 1051, 1055.

The Judicial Officer found that, due to the unique facts presented and the setting in which the lease of the cows was created, Klocker's status as a producer-handler under Order No. 76 was not changed by virtue of the sale and lease back of the dairy herd, as follows:

> We do not have here any elements of a sham transaction to effect a bogus producer-handler status. Cf., *e.g., Elm Spring Farm, Inc. v. United States, supra.* Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

> Effective May 1, 1965, more specific requirements for producer-handler status were enacted. (See Finding of Fact 8.) Briefly, section 1076.9 requires, in pertinent part, that a "producer-handler" be a dairy farmer and that the "maintenance, care and management ~~of the dairy~~ animals and other resources necessary to produce the milk ... are the personal enterprise and risk of" the producer-handler. It appears to us that the production of the milk utilized at petitioner's plant continued to be the enterprise and risk of petitioner subsequent to the agreement of April 1, 1964. That agreement did not deprive petitioner of the responsibility for the management, supervision and control of the dairy herd and farm and the risks incident to the production of milk or alter the fact that the production of milk on petitioner's farm was the "personal enterprise" of petitioner.
>
> "The regulatory scheme embodied in the Order is an intensely practical business, and the question now before us is not to be determined by a purely abstract inquiry as to who had 'title' to the cows which produced the milk." *Elm Spring Farm, Inc. v. United States, supra,* at p. 926. It is concluded, on the basis of the peculiar or unique facts set forth in the record and especially in view of *the setting in* which the contract of April 1, 1964, was created, that petitioner was a producer-handler as defined in the order.... Accordingly, the pertinent contested obligations imposed upon petitioner are not "in accordance with law".

In re Jerome Klocker, supra, 26 Agric. Dec. at 1057-58 (emphasis in original) (footnote omitted).

I disagree with Petitioner's contention that the case law supports Petitioner's Petition. In fact, the cases cited by

Petitioner, except *Klocker*, uphold determinations by various market administrators that leases and similar devices do not create producer-handler status. Moreover, *Klocker* concerns a petitioner who was a producer-handler prior to his sale and lease back of the cows, was the owner of the farm on which the cows were located, was responsible for the management, supervision, and control of the dairy herd and farm, and bore the risks incident to the production of milk. Petitioner in this proceeding was not a producer-handler at the time it executed the lease with Oakridge Farm, does not own Oakridge Farm and has not leased Oakridge Farm, and is not responsible for the management, supervision, or control of Oakridge Farm or the dairy herd or milk production facilities located on Oakridge Farm. I find *Klocker* inapposite.

Fourth, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order conflicts with the AMAA. Specifically, Petitioner asserts that one of the goals of the AMAA is to ensure a sufficient quantity of pure and wholesome milk to meet current needs and that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order undermines that goal of the AMAA. (Petitioner's Appeal at 24-25.)

I agree with Petitioner's contention that one of the goals of the AMAA is to ensure an adequate supply of pure and wholesome milk. Section 8c(18) of the AMAA provides, as follows:

> **§ 608c. Orders regulating handling of commodity**
>
> ....
>
> **(18) Milk prices**
>
> ... Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing

> required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, *he shall fix such prices as he finds will* reflect such factors, *insure a sufficient quantity of pure and wholesome milk to meet current needs* and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. § 608c(18) (emphasis added).

Moreover, the USDA publication which describes the Dairy Division, Agricultural Marketing Service, makes clear that one of the purposes of the Federal milk order provisions is to ensure that consumers have an adequate supply of pure and wholesome milk, as follows:

> **Objectives**
>
> The objective of the Order Formulation Branch is to develop Federal milk order provisions that stabilize market conditions. This is accomplished through assisting dairy farmers in developing steady, dependable markets by providing prices for their milk that are reasonable in relation to economic conditions. Consumers are then assured of an adequate supply of pure and wholesome milk.

PX 8 at 1.

However, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of an adequate supply of pure and wholesome milk, as Petitioner contends. Producer-handler status is not a prerequisite to having control over the quality of milk that a person receives for processing. Each handler may contract with milk producers for milk that meets that handler's quality standards. (Tr. 273.) The record establishes that Petitioner, a handler under the New England Milk Marketing Order, sought and obtained milk that met its quality standards. The Market Administrator's determination that Petitioner was not a producer-handler under the New England Milk Marketing Order had no effect on the purity and wholesomeness of the milk obtained, processed, packaged, and sold by Petitioner. Therefore, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of ensuring an adequate supply of pure and wholesome milk, as Petitioner contends.

Fifth, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order violates Petitioner's right to equal protection of the laws (Petitioner's Appeal at 25-28). Specifically, Petitioner contends that the Market Administrator's determination "– denying producer-handler status to Stew Leonard's on the basis of inadequate risk while granting such status to others who bear demonstrably less risk – is most alarming because it violates the constitutional guarantees of due process and equal protection under the law" (Petitioner's Appeal at 25-26).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[30] Equal protection requires that persons similarly situated be treated alike.[31] However, Petitioner

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[30] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522. 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[31] It should be noted that virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the

has failed to establish that the Market Administrator granted producer-handler status to persons that are similar to Petitioner. The Market Administrator has permitted three producer-handlers to obtain additional milk supplies by leasing cows and milk production facilities (PX 9, PX 17, PX 18). These three producer-handlers owned and operated a dairy farm as their own enterprise and at their own risk at the time they leased additional cows and milk production facilities. Moreover, these three producer-handlers may only obtain up to 25 per centum of their milk from leased

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equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

cows without jeopardizing their status as producer-handlers (Tr. 253).

Petitioner is not similarly situated to these three producer-handlers. Petitioner did not own or operate a dairy farm as its own enterprise and at its own risk at the time Petitioner leased Oakridge Farm's milking cows and milk production facilities. Instead, at the time Petitioner executed the lease, Petitioner was a handler under the New England Milk Marketing Order and did not own or have any interest in a dairy farm, milk production facilities, or cows. Moreover, unlike the three producer-handlers who maintain that status despite their lease of cows and milk production facilities, Petitioner's leased milking cows and milk production facilities provide Petitioner with 100 per centum of the milk which Petitioner processes.

Petitioner has not established that the Market Administrator determined that persons similar to Petitioner are producer-handlers. Therefore, I conclude that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not a violation of Petitioner's right to equal protection of the laws.

X. Respondent's Cross-Appeal

Respondent raises six issues in Respondent's Cross-Appeal. First, Respondent contends that, in Findings of Fact No. 23, the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (Respondent's Cross-Appeal at 2). Specifically, Respondent states:

> The ALJ says that the market administrator said that Stew Leonard's could not be a producer-handler "until" certain changes were made, possibly suggesting that Stew Leonard's would be a producer-handler if the changes were made. In fact,

> the market administrator, in that January 15, 1999 [sic], letter (PX 11), stated that the changes would have to be made "before" Stew Leonard's could be a producer-handler. The market administrator is not saying that the changes would create a producer-handler, i.e. Stew Leonard's would still have to meet the "own enterprise and risk" standard of the order. The market administrator is saying only that without the noted changes, Stew Leonard's could not begin to meet the standards.

Respondent's Cross-Appeal at 2.

Petitioner contends that the ALJ's reading of the Market Administrator's January 15, 1998, letter is correct (Petitioner's Reply to Respondent's Cross-Appeal at 4).

I agree with Respondent's contention that the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (PX 11). The Market Administrator's letter does not contain the word "until," and I do not adopt the ALJ's Findings of Fact No. 23. Instead, I state, in Findings of Fact No. 14, *supra*, that the Market Administrator's January 15, 1998, letter (PX 11) advises Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, and I quote the January 15, 1998, letter from the Market Administrator to Robinson & Cole, LLP.

Second, Respondent contends that, in Findings of Fact No. 25, the ALJ incorrectly states that Petitioner had assumed all risks arising from the operation of Oakridge Farm (Respondent's Cross-Appeal at 2-3). Petitioner contends that the ALJ's Findings of Fact No. 25 is correct and should remain undisturbed (Petitioner's Reply to Respondent's Cross-Appeal at 4-6).

I agree with Respondent that the ALJ erroneously found, in Findings of Fact No. 25, "Stew Leonard's has also

assumed, pursuant to the June 16, 1998, lease, all risks arising from the operation of Oakridge Farm." As an initial matter, under the June 16, 1998, lease (PX 3), Petitioner did not assume all risks "arising from the operation of Oakridge Farm." Instead, the lease provides that Petitioner agrees to "assume all risk ... of the cows, equipment, buildings, and labor" (PX 3 ¶ 3). Moreover, the record reveals a linkage between Bahler Farms, Inc., and Oakridge Farm such that Petitioner's June 16, 1998, lease did not result in Petitioner assuming all risks associated with the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Tr. 97-102, 266-72). Therefore, I do not adopt the ALJ's finding, in Findings of Fact No. 25, that, pursuant to the June 16, 1998, lease, Petitioner assumed "all risks arising from the operation of Oakridge Farm."

Third, Respondent contends that, on page 16 of the Initial Decision and Order, the ALJ makes misleading assertions (Respondent's Cross-Appeal at 3). Specifically, Respondent contends, as follows:

> On page 16 of the decision, the ALJ asserts that Stew Leonard's would not ride the pool if it were a producer-handler, and thus not contribute to cutthroat competition. This is misleading. Whether Stew Leonard's would ride the pool or not is not the issue concerning competition. As the ALJ found in findings number 33 and 34, if Stew Leonard's were a producer-handler it would have "a competitive advantage vis-a-vis fully regulated handlers" and this "advantage would interfere with the orderly operation of the Order and the marketing of milk in Order No. 1."

Respondent's Cross-Appeal at 3.

Petitioner contends that the ALJ's observation concerning Petitioner's involvement in the pool is correct (Petitioner's Reply to Respondent's Cross-Appeal at 6-8).

I agree with Respondent that whether Petitioner would ride the pool, as a producer-handler, is not relevant to the issue of the competitive advantage Petitioner would have vis-a-vis fully regulated handlers. Moreover, I agree with the ALJ's findings in Findings of Fact Nos. 33 and 34, that if Petitioner we re designated a producer-handler, it would have a competitive advantage vis-a-vis fully regulated handlers and that Petitioner's advantage would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing area. Therefore, I have not adopted the ALJ's statements, on page 16 of the Initial Decision and Order, that "Stew Leonard's would not contribute to cutthroat competition" nor have I adopted the ALJ's statements regarding whether Petitioner rides the pool.

Fourth, Respondent contends that, while the ALJ implicitly held that the Market Administrator's determination regarding Petitioner's producer-handler status is not arbitrary and is not the result of unequal treatment, the ALJ failed to explicitly state that the Market Administrator's determination is not arbitrary and is not the result of unequal treatment (Respondent's Cross-Appeal at 3-4).

I disagree with Respondent's contention that the ALJ's conclusion regarding the Market Administrator's determination is not explicit. The ALJ concludes, as follows:

> For reasons set forth above, I conclude that the evidence herein shows that the Market Administrator, in the subject case, made a reasoned decision in denying producer-handler status to Petitioner and that the Petitioner has not carried the burden of showing that the Market Administrator's determination was not in accordance with law.

> Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that the Respondent has exercised reasonable discretion, for articulated reasons that do not deviate from nor ignore the ascertainable goal of the Marketing Order. Accordingly, the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law.

Initial Decision and Order at 37-38.

While the ALJ did not use the words that Respondent would choose, I find that the ALJ's conclusion that "the Market Administrator ... made a reasoned decision in denying producer-handler status to Petitioner" is an explicit conclusion that the Market Administrator's denial of Petitioner's status as a producer-handler under the New England Milk Marketing Order, is not arbitrary. Moreover, the ALJ's conclusion that "the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law" is an explicit conclusion that the Market Administrator violated no law, including the Fifth Amendment guarantee of equal protection of the law, when he determined that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Fifth, Respondent states that the ALJ quotes misleading testimony given by the Market Administrator, as follows:

> On page 30 of the Decision, the ALJ includes some cross examination of the market administrator where the market administrator says that the factors he discovered concerning joint ownership of an insurance policy did not color his thinking. This is misleading. Although the market administrator did not know all of this information when he initially

> denied Stew Leonard's request for producer-handler status, it became part of his decision when he did learn of it. As described in respondent's initial Brief, the market administrator makes his final determinations on handler obligations based on audits conducted subsequent to the actual deliveries of milk. Moreover, the general provisions governing all federal milk marketing orders provide that a handler remains obligated for payments for two years after each month's handler reports are received by the market administrator. 7 C.F.R. 1000.6. Therefore, these factors were ultimately included in the market administrator's determination. In addition, the determination of producer-handler status is done monthly, i.e. the grant of status one month does not automatically carry over to the net [sic] month. So, as of approximately December, 1998, the market administrator knew of these facts before each of his succeeding denials of Stew Leonard's request for producer-handler status.

Respondent's Cross-Appeal at 4-5.

I disagree with Respondent's contention that the ALJ's quotation of the Market Administrator's testimony is misleading. The ALJ's quotation of the Market Administrator's testimony is accurate and is not taken out of context. Therefore, while I do not quote the testimony in question in this Decision and Order, I do not find that the ALJ erred by accurately quoting the Market Administrator's testimony.

The Market Administrator testified that, when he made his determinations in February 1998 and July 1998 regarding Petitioner's producer-handler status, he did not take into account the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm (Tr. 278-79). However, even without

these two factors, I find that the Market Administrator had a rational basis for his February 1998 and July 1998 determinations that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F. R. § 1001.10). Moreover, the Market Administrator's determination of producer-handler status is made monthly (7 C.F.R. § 1001.10). Once the Market Administrator became aware of the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm, those factors could become part of the basis for the Market Administrator's continuing refusal to determine that Petitioner is a producer-handler under the New England Milk Marketing Order.

Sixth, Respondent asserts that "[t]he most significant element of the ALJ's Decision that needs to be amended are the 'concerns' the ALJ expresses over the [M]arket [A]dministrator's exercise of discretion in administering the order. *See* [Initial Decision and Order at] 28, 29, 36-38." (Respondent's Cross-Appeal at 5-6.) Petitioner contends that the ALJ's expression of doubt concerning the Market Administrator's use of discretion in denying Petitioner's Petition is valid and should be preserved (Petitioner's Reply to Respondent's Cross-Appeal at 10).

The ALJ concluded that the Market Administrator's determination that Petitioner was not a producer-handler was a reasoned decision, was correct, and was in accordance with law (Initial Decision and Order at 37-38). 1 agree with the ALJ's conclusions. In light of the ALJ's conclusions regarding the Market Administrator's determination of Petitioner's status and my agreement with the ALJ's conclusions, I find the ALJ's concerns about the Market Administrator's exercise of discretion are not relevant to the issue in this proceeding; *viz.*, whether the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the

New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Therefore, I do not adopt the ALJ's discussion regarding the concerns the ALJ has with the Market Administrator's use of discretion.

I have considered all the contentions of the parties and based upon the facts and existing case law, conclude that Petitioner is not entitled to producer-handler status under the New England Milk Marketing Order. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that Petitioner has not carried its burden of showing that the Market Administrator's determination was not in accordance with law.

XI. Conclusions of Law

1. Petitioner is a "handler," as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9).

2. Petitioner is not a dairy farmer.

3. Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk, which Petitioner leases from Oakridge Farm.

4. Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

5. The Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law.

For the foregoing reasons, the following Order should be issued.

XII. Order

Petitioner's Amended Petition is dismissed.

Done at Washington, DC
March 16, 2000

s/ _____
William G. Jenson
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	98 AMA Docket No. M 1-1
	)	
Stew Leonard's,	)	
	)	
	)	Decision and Order
Petitioner		September 10, 1999

Preliminary Statement

This is a proceeding brought pursuant to the provisions of § 9(c)(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. §§ 601, *et seq.* (the "Act"). Petitioner challenges a determination by the Market Administrator of Order No. 1, 7 C.F.R. Part 1001, which regulates the handling of milk in the "New England Marketing Area." The Market Administrator's determination rejected Petitioner's request for producer-handler status under the provisions of Order No. 1. Petitioner's initial Petition, filed on February 17, 1998, sought relief from the Market Administrator's February 6, 1998 determination that the provisions of a December 10, 1997, lease by Petitioner of certain milk production facilities of Oakridge Farm were insufficient to confer producer-handler status on Petitioner. An Amended Petition was subsequently filed.

Stew Leonard's (Petitioner) Petition, filed pursuant to 7 U.S.C. § 608c(15)(A) alleged that it should be designated as a producer-handler; that it be declared that it was no longer required to file handler reports nor required to comply with all other requirements of a handler under the Federal Statutes, Regulations and Milk Order. Set forth in the aforesaid Petition were reasons which the Petitioner

maintained were of sufficient moment to characterize the Market Administrator's decision as one having no rational basis in the law and as being arbitrary and capricious and an abuse of his administrative discretion. It was further alleged that the Market Administrator's decision violated the rights guaranteed to Petitioner by the Fifth Amendment of the United States Constitution in that it deprived Petitioner of its property rights without due process of law.

Thereafter, Petitioner submitted to the Market Administrator a revised lease of June 16, 1998, between Petitioner and Oakridge Farm on the basis of which it again sought the Market Administrator's determination that Petitioner was entitled to be treated as a producer-handler under Order No. 1. Following the Market Administrator's July 31, 1998 advice to Petitioner that its revised June 16, 1998, lease of certain Oakridge Farm milk production facilities could not qualify Petitioner as a producer-handler under Order No. 1, on August 12, 1998, Petitioner sought and was granted leave to file an Amended Petition in which it alleged that the Market Administrator's refusal to confirm Petitioner as a producer-handler on the basis of its revised June 16, 1998, lease was "not in accordance with law" for the same reasons as set forth in its original Petition.

Respondent filed a timely Answer to Petitioner's Amended Petition denying the allegation that Petitioner qualifies as a producer-handler under Order No. 1 and stating that the Amended Petition fails to state a claim upon which relief can be granted.

Agri-Mark, Inc. and National Milk Producers Federation filed Motions to Intervene and for Leave to Participate in the subject proceedings. On July 9, 1998, the Agri-Mark, Inc.'s and National Milk Producers' Motions were granted in part in that said entities were granted the opportunity to file briefs in this (15)(A) proceeding; otherwise, said Motions were denied. Agri-Mark's Motion to Intervene as a party was denied and its appeal to the Judicial Officer (joined in by New England Dairies, Inc.) of

that denial were denied by the Judicial Officer on December 4, 1998, on the grounds that the appeals were from interlocutory, non-appealable orders under the Rules of Practice.

An oral hearing on Petitioner's Amended Petition was held on January 11-12, 1999, in Hartford, Connecticut, before Dorothea A. Baker, Administrative law Judge. Petitioner was represented by James A. Wade, Esquire, Robinson & Cole, LLP, Hartford, Connecticut. Respondent was represented by Donald A. Tracy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C.. The case was referred to the Judge for decision on July 15, 1999. Also meeting an appearance at the oral hearing was Sidney Berde, Esquire, 7327 East Echo Lane, Scottsdale, Arizona 85258, on behalf of Agri-Mark, Inc., and John H. Vetne, Esquire, 72 State Street, Newburyport, Massachusetts 01930, representing the National Milk Producers Federation.

Findings of Fact

1. Petitioner, Stew Leonard's Dairy, is a handler as that term is defined in Federal Milk Marketing Order No. 1 (7 C.F.R. § 1001.9).

2. Stew Leonard's Dairy (Petitioner) is a partnership and is a family owned and operated grocery business that has been in operation since 1969. It is engaged in the business of selling milk and other dairy and food products to consumers at its retail grocery stores in Norwalk and Danbury, Connecticut, with a principal place of business located at 100 Westport Avenue, Norwalk, Connecticut.

3. At its retail food store in Norwalk, Connecticut, it distributes fluid milk products processed at its fluid processing plant located on the same premises. At its second retail food store in Danbury, Connecticut, it distributes fluid milk products processed at the Norwalk fluid milk processing plant.

4. Petitioner's Norwalk, Connecticut retail store and regulated milk processing plant is owned by a partnership consisting of Marianne Leonard and the Marianne Leonard 1993 Trust (PX-1; Tr. 21-22). Petitioner has no ownership interest in the Danbury, Connecticut retail store through which it distributes a portion of the fluid milk products processed at its Norwalk regulated processing plant. The latter store is owned by a limited liability corporation whose ownership is divided among various members of the Leonard family other than the partnership owners of Petitioner. (PX-1; TR. 23-25).

5. Stew Leonard's holds itself out as operating the world's largest dairy store, a specialty store, as compared to 7-11s or other C stores. (Tr. 128).

6. At Stew Leonard's Norwalk facility, a dairy processing plant, there are glass walls permitting customers to watch as raw milk, delivered from the farm daily, is pasteurized, homogenized, packaged and transferred to shelves for purchase. (Tr. 41, 125-126). Petitioner receives and processes about two-thirds of a tanker truck of milk each day, which is substantially less than its larger competitors, some of which take in hundreds of tanker trucks of milk per day. (Tr. 119, 493). Stew Leonard's sells approximately 1.2 million gallons of milk per year, which is substantially less than its larger competitors such as the Stop & Shop Supermarket Companies, which sell 40 million gallons of milk per year. (Tr. 488, 494).

7. In recent years, Stew Leonard's employees have noticed a growing concern among customers regarding impurities in food, including hormones and other unnatural additives in cow feed and antibiotics administered to sick cows, some of which might make their way into dairy products. Also of concern to customers were pesticides and chemical residues that might be present on produce. (Tr. 40, 111, 121).

8. Prior to January 1, 1998, Petitioner received its entire raw milk supply from Agri-Mark, Inc., a

cooperative association, whose dairy farmer members supply milk to handlers regulated by Order No. 1. (Tr. 210, 215).

9. Oakridge Farm is a dairy farm in Ellington, Connecticut which owns approximately 550 cows and is owned by members of the Bahler family. (Tr. 56). Prior to January 1, 1998, Oakridge Farm was a member of Agri-Mark, Inc.. (Tr. 210).

10. Oakridge Farm is owned by Atlas Associates, a partnership whose partners, according to public records in Ellington, Connecticut, are Corbin, Kenneth and S. Owen Bahler. (Tr. 267). There is a second certificate which lists Atlas Associates, d/b/a Oakridge Farm. (Tr. 267).

11. Vern Bahler is President of Bahler Farms. (Tr. 267).

12. Bahler Farms is a corporation that operates a dairy farm which is contiguous to Oakridge Farm. (Tr. 102).

13. Oakridge and Bahler Farms are operated jointly in that they "share equipment and a full-time calf raiser, a mechanic and full-time milkers." (Tr. 102).

14. Dave Bahler, who operates Bahler Farms, has check writing authority for Oakridge Farm. (Tr. 97-98).

15. The Bahlers purchase feed and other materials jointly for the two farms. (Tr. 98-99).

16. Partly in response to customers' concerns relating to the quality, source and composition of the milk sold by the Petitioner, Petitioner entered into a lease with the diary farm known as Oakridge Farm in Ellington, Connecticut on December 10, 1997, for the purpose of maintaining direct control over both the production and sale of its milk products.

17. On December 10, 1997, a document entitled "Lease Agreement" was executed by Kenneth Bahler, as "Partner" on behalf of Oakridge Farm of Ellington, Connecticut and by Stewart J. Leonard, Jr. as "President" on behalf of Stewart Leonard's. (PX-2). Pursuant to said agreement Petitioner agreed to lease Oakridge Farm's cows

and milk production facilities. According to said lease, Petitioner agreed to lease from Oakridge Farm its entire herd of milking cows, its barns, milking palace, personal property and all equipment necessary to produce raw milk and its related products, for a fixed sum. Petitioner also agreed that it would transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense. In addition, Petitioner agreed, pursuant to the lease, to pay for all ordinary and necessary expenses relating to the production, processing, and, packaging of milk and its related products. Bahler Farms Inc. was to be paid a management fee and Petitioner agreed to buy corn silage from Bahler Farms Inc.

18. After the adoption of the December 10, 1997 lease, Stew Leonard's requested that the Market Administrator recognize Stew Leonard's as a producer-handler pursuant to Milk Order No. 1, 7 C.F.R. § 1001.10. (PX-10, December 30, 1997, letter from the Market Administrator acknowledging Stew Leonard's request for recognition as a producer-handler). On December 18, 1997, Petitioner notified the Order No. 1 Market Administrator, Erik Rasmussen, that Stew Leonard's had entered into an agreement to receive milk directly from Oakridge Farm with the intention of becoming a producer-handler. On December 30, 1997, Mr. Rasmussen responded to Petitioner's letter by quoting the regulatory requirements for producer-handler status under Order No. 1 and by advising Petitioner that the version of the proposed lease agreement with "Bahler-Oakridge Farm," that was provided to the Market Administrator's office, failed to meet the requirements of the Order. (PX-10).

19. On January 5, 1998, counsel for Petitioner sent a copy of the executed December 10, 1997 lease to Mr. Rasmussen with a letter requesting his advice "in what respects the lease fails to meet the requirements of" the producer-handler provisions of Order No. 1. (PX-12).

20. On January 15, 1998, Mr. Rasmussen responded by letter to advise Petitioner's counsel that the proposed December 10, 1997 lease "fails to meet the Order requirements" for producer-handler status, by again quoting the regulatory requirements of the Order, and by advising Petitioner that the proposed December 10, 1997 lease could not change Stew Leonard's handler status to that of a producer-handler. (PX-11).

21. Stew Leonard's revised the December 10, 1997 lease of Oakridge Farm and adopted a June 16, 1998, lease, in response to comments made by the Milk Market Administrator for Milk Order No. 1 in a letter dated January 15, 1998. (PX-11).

22. The Stew Leonard's and Oakridge Farm's revised lease on June 16, 1998 (PX-3), contained the following operative terms:

1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew Leonard's agrees to replace culls and/or attrition with newly bred heifers.
2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing,

packaging, sale and distribution at its own expense.

3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk. Also, Stew Leonard's agrees to assume all risk, responsibilities, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice, 60 days prior to change, is required in the event of any change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

23. The Administrator's letter dated January 15, 199, stated that Stew Leonard's could not qualify as a producer-handler by virtue of the lease of Oakridge Farm until two changes were made. Specifically:

> As written, the proposed lease fails to meet the Order requirement that the handler "provides as the

person's own enterprise and risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route distribution."

Specifically, Paragraph 3 states that the parties "agree to review and adjust the payments called for herein on a quarterly basis. This provision, in effect, eliminates any risk of loss to Stew Leonard's Dairy as a result of "uncertainties that related to the cost of farming. Such risk is inherent to a producer-handler's operation and must be assumed by Stew Leonard's Dairy before the handler's status is changed to that of a producer-handler.

In addition, the fixed amount and the frequency of the management fee to be paid to Bahler Farms, Inc. by Stew Leonard (also noted in Paragraph 3) must be specified in the lease.

24. On February 6, 1998, Mr. Rasmussen notified Petitioner by letter that he had reviewed the various leases that Stew Leonard's had proposed to change its regulatory status from a handler under Order No. 1 to a producer-handler exempt from the regulatory provisions applicable to handlers. The letter stated that in contrast to currently operating producer-handlers who meet the regulatory requirements for producer-handler status under the Order:

***You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(5). The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.

> Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision refer to 7 U.S.C. (608(c)(15)(A). (PX-14).

Said letter also stated that: "There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes."

25. Since entering into the December 10, 1997 lease of Oakridge Farm, Stew Leonard's has, pursuant to the lease, paid all expenses incurred at Oakridge Farm in the production of milk. (Tr. 188-189). Stew Leonard's has also assumed, pursuant to the June 16, 1998, lease, all risks arising from the operation of Oakridge Farm. (PX-3). Stew Leonard's has purchased insurance to cover its obligations with respect to Oakridge Farm, with a policy providing a benefit of $1 million per occurrence, $2 million per year, and with an umbrella benefit of $45 million per year. (Tr. 498).

26. The records for Oakridge Farm were kept at Bahler Farms. (Tr. 268-269).

27. Oakridge and Bahler Farms shared the specific financial risk of a loan for which they jointly pledged security to the First Pioneer Farm Credit. (Tr. 269).

28. Petitioner has no leasehold or other interest in the actual farmland of Oakridge Farm. (PX-3).

29. Every producer-handler in Federal Milk Marketing Order No. 1 is a dairy farmer who owns his own farm. (Tr. 252).

30. Of the twenty producer-handlers in Order No. 1, three have leased extra cows to increase their production by no more than twenty-five percent. (Tr. 252-254).

31. Petitioner does not own a farm and does not know how to operate a dairy farm. (Tr. 145).

32. Producer-handler status is not necessary to obtain the quality control sought by Petitioner.

33. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-à-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact. (Tr. 244-245, 250). The payment amount that Petitioner would have avoided if it had been a producer-handler was as high as thirty-seven cents per gallon. (Rx-C; Tr. 247-252).

34. This advantage would interfere with the orderly operation of the Order and of the marketing of milk in Order No. 1. (Tr. 245).

35. If Petitioner were a producer-handler, it would have as much as a twenty-five cent per gallon advantage over his competitor, Stop & Shop. This is an industry where differences of less than one cent per gallon can have a competitive impact. (Tr. 452, 482, 484).

36. Oakridge Farm produces milk that is substantially better in quality than milk that can be obtained from dairy cooperatives. Specifically, as measured in Stew Leonard's own fully certified laboratory (PX-5), Oakridge Farm milk contains a significantly lower level of bacteria than the maximum permissible level for Grade A milk, and the level is also significantly lower than typical milk produced by dairy cooperatives. The standard plate count of bacteria in Oakridge Farm raw milk is approximately 50,000 per milliliter, compared to the maximum permissible level of 300,000 per milliliter pursuant to healthy regulations and 250,000 per milliliter found in typical milk. (PX-6; Tr. 157-159, 167-168). Because of this, Stew Leonard's milk has a shelf life of up to 23 days, compared to the minimum of approximately 13 days required by health regulations and a typical shelf life for dairy cooperative milk of approximately 16 days. (Tr. 160). Customer returns of milk dropped to 225 half-gallons in 1998, from approximately 1,500 half-gallons in 1997. (Tr. 166).

37. Cows at Oakridge Farm are in exceptional good health. This is shown in the somatic cell count, a measure of cells from the adult cow found in the milk, which is a reflection of cow health. (Tr. 164-165). The somatic cell count of Oakridge Farm milk is approximately 70,000 per milliliter, compared to approximately 250,000 for typical milk and a maximum permissible level of 500,000. (PX-6; Tr. 164-165). A second indication of the health of cows is whether there is the presence of antibiotics in the milk, which reflects the administration of antibiotics to sick cows. Since Stew Leonard's has been obtaining its milk from Oakridge Farm, Stew Leonard's obtained its milk from the dairy cooperative Agri-Mark, Stew Leonard's rejected two loads of milk, or 12,000 gallons, because of the presence of antibiotics. (Tr. 165-166).

38. Cows at Oakridge Farm are not fed dietary supplements designed to artificially increase their production of milk, including the supplement RBST. (TR. 64, 88, 120). Once RBST has been administered to cows, there is no test to detect the present of RBST in milk. (Tr. 468).

39. The lease of Oakridge Farm permits Stew Leonard's to receive its milk daily from the farm, with a daily delivery of approximately two-thirds of a tanker truck. (Tr. 119). Milk is available for purchase by customers in as little as six hours from the time it is milked from the cows. (Tr. 120). Agri-Mark had been able to guarantee only that its milk was produced within the preceding seventy-two hours. (Tr. 116).

40. In the approximately one year since Stew Leonard's began to receive all its milk from Oakridge Farm, and to advertise that its milk came from a single farm and was free of RBST, milk sales at Stew Leonard's have increased more than ten percent. (Tr. 40-41).

41. The Milk Market Administrator for Order No. 1 has permitted other enterprises to be designated as producer-handlers even though they obtain a portion of

their milk from cows that are leased by the enterprises. The terms of these leases are reflected in PX-9, PX-17, and PX-18. The Administrator permits these farms to obtain up to twenty-five percent of their milk from leased cows without jeopardizing their status as producer-handlers. (Tr. 253). The Administrator concedes, these lessees do not operate their leased farms as their own enterprise, and do not assume the full risks of producing milk at the leased farms. (Tr. 317, 425, 441). In determining the extent to which this can happen, the Market Administrator exercises "Administrative discretion."

42. The quality control aspects that Petitioner seeks are completely independent of Petitioner's status. As a fully regulated handler for the last year, Petitioner has accomplished its desired quality control goals while accounting to the pool for the use of its milk. (Tr. 94, 171, 258, 259).

43. Perhaps most importantly, the lease did not change the details of the operation of the farm. Before the lease, the Bahlers operated Oakridge Farm, with inter-connections to Bahler Farms, and after the lease the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms. (Tr. 93).

44. The evidence of record does not show that the determination by the Market Administrator was not in accordance with law.

45. The evidence of record does not establish that Petitioner should be treated as a producer-handler under the Order by leasing its entire production facility because it does not operate a dairy farm as its own enterprise and at its own risk, as contemplated by 7 C.F.R. § 1001.10.

Discussion and Conclusions

Petitioner is a milk handler. The issue to be resolved herein is whether said Petitioner is a producer-handler as defined in Federal Milk Order No. 1, 7 C.F.R. § 1001.10 *et seq.*. Petitioner leased its entire milk source by leasing a

farm and maintains that it is now producing and processing milk as its own enterprise and at its own risk, as required for producer-handler status.

The Market Administrator and Respondent deny that Petitioner operates its leased dairy farm as its own enterprise and at its own risk.

Milk market regulations are routed in two characteristics: (1) fluid milk commands a higher price than milk put to other uses, even though the quality of the milk is the same; and (2) milk production varies with the season, so that a herd of cows large enough to meet consumer demand in the winter will, in the more productive warmer months, produce an oversupply of milk. *Zuber v. Allen*, 396 U.S. 168 (1960). Prior to regulation, milk processors were able to demand bargain prices during the summer. Farmers increased production to maintain their income and a disequilibrium snowballed. In response, Congress adopted a series of legislation ending with the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c, which established the price regulation scheme involved in this case. One goal of price regulation was to discourage cutthroat competition among farmers to sell their milk for use as fluid milk. *United States v. Rock Royal Co-op Inc.*, 307 U.S. 533 (1939). The Act and Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thus eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. By use of the equalization payments, farmers receive the same price regardless of the ultimate use to which their milk is put. The procedure for achieving equalization generally is that the Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. The result is divided by the total

quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

The economic theory of the "producer-handler" exemption is that the "producer-handler" is a self-contained production, processing and distribution unit which does not share its Class I milk utilizations with the other producers supplying milk to the area, and does not count on the other producers to meet any of its needs. It is not appropriate to permit the producer-handler, through exemption from pooling, to shift to other producers any portion of the burden of carrying the reserve supply associated with its milk business. Producer-handlers were carved out of the pricing regulation because their regulation was not necessary to achieve the declared policy of the Act. *In re: Clyde Lisonbee,* et al., 31 Agric Dec. 952 (1972). A producer-handler must normally rely upon its own production of milk as the source of supply for its processing operations – it may not receive any milk from other dairy farmers. To do otherwise, would be to shift to other producers a portion of the burden of carrying the reserve supply associated with the milk business.

In the case at issue, the manner in which Stew Leonard's operates indicates it does not ride the pool. Said Petitioner is a relatively small, self-contained family owned farm and dairy operation that produces and sells its own milk to consumers. It does not sell its milk to other

processors and does not buy milk from them. Even in the absence of the milk pricing scheme, Stew Leonard's would not contribute to cutthroat competition by selling its milk to handlers for use as fluid milk. Petitioner simply sells at retail what it produces on the leased farm.

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the Petitioner.[32] The Petitioner (in this proceeding known as Stew Leonard's),

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[32] *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 382 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-636 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re: Midway Farms, Inc.*, 56 Agric. Dec. 102, 112-113 (1997); *In re: Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re: Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re: Hershey Chocolate*, U.S.A., 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re: Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re: Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re: Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re: County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re: Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re: Moser Farms, Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re: Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re: Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-402 (1974); *In re: Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re: Clyde Lisonbee et al.*, 31 Agric. Dec. 952, 961 (1972); *In re: Adam L. Liptak*, 24 Agric. Dec. 1176 1181 (1965).

therefore, bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.[33]

The burden of proof is upon the Petitioner to show that the Market Administrator's determination that it is not entitled to producer-handler exemption is not in accordance with the law. Because producer-handler status is an exception to the general regulatory scheme of the Act, it must be strictly construed. *In re: Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805 (1995). [1996 WL 472414 E.D.Pa. 1996]. In the subject case, the Petitioner's proof has not been sufficient to show that the Market Administrator's determination was not in accordance with law. The Market Administrator's interpretation of the Order's provisions that he administers is entitled to great weight unless patently contrary to law or the clear language of the Milk Order provisions. It is an axiomatic principle of law that an administrative agency's interpretation of its own regulations must be accorded great deference in any administrative or court proceeding. Also, an agency's construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations. *Bowles, Price Administrator v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).* Because of this deference given to the Market Administrator's interpretation, it is found that the Petitioner has not carried its burden of showing that the determination from which it

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[33] *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1996). *See also Attorney General's Manual on the Administrative Procedure Act*, 75 (1947) (stating "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); 3 *Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (describing that the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

seeks relief was not a reasonable interpretation and implementation of the Order provisions. In the subject case the Market Administrator's decision was warranted by the record and has a rational basis in the law.

Although having some differences, as noted by Petitioner on brief, the Department of Agriculture's position has been to consistently uphold determinations by the Market Administrator that leases and similar devices do not create producer-handler status. Although the cases do not actually say that leases will not create a producer-handler, the overall rationale of the cited cases is the straightforward requirement that leases and similar devices do not create producer-handler status.

See, United States v. Elm Spring Farms, Inc., 38 F. Supp. 508 (D. Mass. 1941), *aff'd.* 127 F.2d 920 (1st Cir. 1942); *In re: Martin S. Cosgrove*, 1 Agric. Dec. 503, and 510 (1942), *aff'd. Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re: Henshaw*, 1 Agric. Dec. 721 (1942); *In re: Antone Amarla*, 3 Agric. Dec. 367 (1944); *In re: Martin & Costa*, 4 Agric. Dec. 636 (1945); *In re: John Velozo*, 5 Agric. Dec. 739 (1946); *In re: Eugene M. Olson, d/b/a Olson Dairy*, 22 Agric. Dec. 877 (1963); *In re: Fred A. Brown, et al., d/b/a Gem Dairy*, 23 Agric. Dec. 18 (1964), *aff'd. Fred A. Brown v. United States*, 367 F.2d 907 (10th Cir. 1966); *In re: Willow Crossing Dairy Farm, Inc.*, 29 Agric. Dec. 1007 (1970); *In re: Sherman Fitzgerald, d/a/a Sher-Von Dairy*, 31 Agric. Dec. 593 (1972); *In re: Clyde Lisonbee, d/b/a Temple-View Dairy*, 31 Agric. Dec. 952 (1972); *In re: Andrew W. Leonberg*, 32 Agric. Dec. 763 (1973); *In re: Pleasant View Farms, Inc.*, 36 Agric. Dec. 1262 (1977); and *In re: Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986).

The decision in *In re: Jerome Klocker*, 26 Agric. Dec. 1050 (1967), establishes that a *bona fide* producer-handler under the Order did not lose such status by reason of a contract whereby the producer-handler leased a dairy herd and hired the lessor as his employee due to the unique facts presented and the setting in which the contract was created. In arriving at such conclusion it was stated:

> We do not have here any elements of a sham transaction to effect a bogus producer-handler status. *Cf., e.g., Elm Spring Farm, Inc. v. United States, supra.* Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

The case law also supports the proposition that a handler does not deserve producer-handler status if the handler merely engages in a sham transaction designed to circumvent the milk pricing regulations, or if the lessee fails to assume the risks of farming. *See, e.g., In re: Sherman Fitzgerald,* 31 Agric. Dec. 593 (1972) ("In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation."). There is no case precisely in point which supports the argument that a handler who obtains a farm by lease can never satisfy the "own enterprise" and "own risk" requirements of the producer-handler regulation, even

where it directs how the farm is run, pays all costs, and assumes all risks. For example:

- In *Elm Spring Farm v. United States*, 127 F.2d 920 (1st Cir. 1942), a handler "purchased" cows from various sellers, but paid for the cows with a combination of promissory notes and stock, and the "sellers" were entitled to "repurchase" the cows under liberal terms. 127 F.2d at 923. The "sellers" agreed under separate contracts to maintain the cows and deliver milk to the handler, and further guaranteed that the cost of producing milk, including the expense of cattle illness or death, would not exceed the blend price plus a specified figure. *Id.* The court called this scheme an "elaborate camouflage" in which the handler "avoid[ed] the risks of production." *Id. at 927. See also Cosgrove v. Wickard*, 49 F. Supp. 232, 234-2325 (D. Mass. 1943) (invalidating a similar scheme in which cows were "purchased" with a small cash payment and substantial note on which no payments were made, and where the only payments made on a purported lease were based on the quantity and butterfat content of milk produced).
- In *In re: Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (U.S.D.A. 1986), the petitioner leased a farm, but had a joint checking account with the lessor and various related businesses, including two other dairy farms, which thereby pooled their resources. *Id.* at 45. The lessor controlled the bank account. *Id.* The ledger sheet of Echo Spring did not reflect whether it had withdrawn more from the account than it had deposited, or vice versa, and Echo Spring frequently withdrew more than it deposited. *Id.* at 44, 46. The lease payments by Echo Spring were made from the same checking account, *Id.* at 47, meaning the related businesses subsidized Echo Spring's lease payments.
- In *In re: Clyde Lisonbee*, et al., 31 Agric. Dec. 952 (U.S.D.A. 1972), the judicial officer denied a Petition for producer-handler status where the petitioner claimed to be purchasing a herd at Bringhurst farm and claimed that the operation of the milk production facilities was under the

petitioner's control. *Id.* at 954. The evidence showed, however, that the petitioner merely accepted milk from the farm, never agreed to a purchase price and never identified the cows to be "purchased." *Id.* at 954-955. Furthermore, "Petitioner carried no insurance on the cows or on any of the equipment on the Bringhurst farm [and] Petitioner gave Bringhurst no instruction on feeding or caring for the cows." *Id.* at 955.

- In *In re: Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (U.S.D.A. 1970), the judicial officer found that the petitioner was not a producer-handler where the petitioner leased cows that were delivered to the petitioner's property during lactation and returned when they stopped lactating. In that case, the petitioner was not responsible for loss of cows and, when the cows were not on the petitioner's property, the petitioner took no interest in their breeding, care, sale or health. *Id.* at 1008-1009.

> [I]t is plain that the dairy farmers who own the cows suffer the risks of the cows going dry and dying even when the cows are under lease and on the petitioner's premises. Too, the petitioner has no responsibilities for the care of the cows, the breeding of the cows, the health of the cows or any other risk involving the cows when they are not under lease and being fed and milked at the petitioner's dry lot.

- In *In re: Fred A. Brown*, 23 Agric. Dec. 18 (U.S.D.A. 1964), the judicial officer denied a petition for producer-handler status where a dairy "purchased" an undivided one-tenth interest in cows for $15 per cow, under an arrangement that would return the $15 to the dairy upon the sale of each cow. *Id.* at 22, 23. The dairy obtained the absolute right to all milk produced by the cows, which stayed in the possession of the majority owner, and the dairy paid the majority owner a fee "for the services required" that was the same as the price of milk. The judicial officer noted that the dairy assumed no risk, since

the $15 fee per cow would be returned. In the course of the decision it was stated:

> * * * The record as a whole and the contracts relied upon by petitioners *even if accepted at face value* indicate that petitioners do not operate a dairy farm and do not bear any risk of producing the milk handled by them and that the production facilities, as distinguished from the milk processing facilities, are not the personal enterprise of petitioners.

The cases cited above support the proposition that a dairy that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not deserve producer-handler status. There are no cases precisely in point to support the proposition that a dairy, which leases a farm, dictates the essential elements of the farm's management, and assumes substantially the entire risk of farming, is nevertheless still not a producer-handler. Respondent maintains Petitioner was not operating "at its own risk" because there were numerous risks not assumed nor borne by Petitioner in that Petitioner had no interest in the land and anything that happened to the land (such as toxic waste) was at the risk of the farm owner. Furthermore, it is argued that the capital risk inherent in property ownership was a shared one with the Bahlers by reason of a joint security note to the First Pioneer Farm Credit.

The facts established at the hearing show that Stew Leonard's is engaged in the business of selling milk and other dairy and food products, primarily fresh goods, from a retail store in Norwalk, and also from a retail store in Danbury, Connecticut, and for business reasons, is sensitive to the needs and demands of its customers. In particular there is a growing concern among shoppers regarding impurities in food, including hormones and other unnatural additives fed to cows, antibiotics that make their way into milk after being administered to sick cows, and chemical

and pesticide residues on produce. Customers have been particularly concerned about the presence in milk of RBST, a recently developed synthetic protein that increases a cow's milk production.

Partly in response to these concerns, Petitioner entered into a lease of the Bahler Farms in December of 1997; the operative lease which is a modification of the original one was signed June 16, 1998. The lease was for the cows and production facilities of the Bahler Oakridge Farm ("Oakridge Farm"), an approximately 550-cow dairy farm in Ellington, Connecticut, operated by Vern Bahler and members of his family. Specifically, Petitioner leased the herd of cows, barns, milking parlors, personal property and "all equipment necessary to produce raw milk and its related products." Lease of June 16, 1998, PX-3, at ¶¶ 1, 2. Petitioner also agreed to pay the expenses of production of milk, and to assume "all risks, responsibility and maintenance of the cows, equipment, building and labor." *Id.* at ¶ 3. The aforesaid risks and responsibilities included but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance." *Id.* The lease had a term of two years. *Id.* at ¶4.

This lease offered significant business advantages to Petitioner. First, Oakridge Farm operates with extreme attention to hygiene and purity that is so important to Stew Leonard's and its customers. Petitioner sought out the Bahlers based in part on the low level of bacteria present in milk they produce and the care with which they treat their cows. Oakridge Farm is careful to keep its equipment sanitary, an example of which is that the cows' udders are sanitized with an iodine spray prior to milking. The cows are well-treated and healthy, which is an important consideration because sick cows are often treated with antibiotics that make their way into the milk. In the past,

Petitioner had obtained its milk from the dairy cooperative Agri-Mark, and had on occasion rejected loads of Agri-Mark milk because of the presence of antibiotics, leaving Stew Leonard's with insufficient milk to satisfy its customers until the following day. The Bahlers supplement their cow feed with minerals, but do not use hormones, RBST or other unwholesome additives. "We have a nutritionist, which we meet with at least once a week, and we formulate a special diet for them." (Tr. at 64-65, testimony of Vern Bahler).

Second, the lease of Oakridge Farm permits Stew Leonard's to receive and process raw milk each day for that day's sales, and to advertise that fact to customers. Customers can purchase milk within as little as six hours from the time the cows are milked. Agri-Mark could guarantee only that its milk was taken from cows in the preceding seventy-two hours.

Finally, and perhaps most significantly, because Stew Leonard's produces all its raw milk at Oakridge Farm, Stew Leonard's can advertise to its customers the condition of the cows and the contents of the milk, including the absence of RBST. The testimony of Greg Hartman. Stew Leonard's Director of Plant Operations indicated:

> We tell [customers] that we control the feed of the animals. We control the health of the animals. We treat our animals very gently. We wash their udders and sanitize them before we draw the milk from them.
>
> We feed them nothing but nutritious feeds. We are borderline operators of organic milk, and that is what we look for in the future. We are not using growth hormones and that the milk is actually from the farm to their table can actually be a six hour duration. (Tr. 120).

Such representations had not been possible prior to the Oakridge Farm lease. There is no test to determine the presence of RBST in milk. Having a farmer merely certify that milk is free of RBST, while recognizing the farmer's strong incentive to use an additive that increases milk production, would be a poor safeguard against its use. Therefore, a dairy such as Petitioner's can be certain its milk is free of RBST only by taking over the farm, paying all the bills, and removing any incentive for the farmer to artificially increase the herd's production. Agri-Mark could not provide an adequate assurance that its milk was free of RBST. Agri-Mark mixes in its tanks the product of numerous dairy farms. When Agri-Mark collected milk from Oakridge Farm, Vern Bahler could not control the cleanliness of the truck or hoses and did not know the source of the milk already in the truck tank.

It is the Petitioner's argument that the lease of Oakridge Farm imposes on Stew Leonard's every identifiable expense of dairy farming, from labor costs to building maintenance and also every risk of dairy farming, whether identified in the lease or not. Under the lease, Stew Leonard's dictates all crucial elements of the operation of the enterprise.

Sample invoices demonstrate that Petitioner, in fact, does pay all costs of operating Oakridge Farm. Specifically, the sample invoices show that Stew Leonard's pays the costs of fertilizing cows; hardware maintenance and repair; equipment repair; feed; payroll; veterinarian services; and services to keep track of animals. (Tr. 188-189). Stew Leonard's also maintains liability insurance on Oakridge Farms, with a benefit of $1 million per occurrence and $2 million per year, plus an umbrella policy with a benefit of $45 million. (Tr. 498).

The Respondent, and the Market Administrator maintain that Stew Leonard's relationship with Oakridge Farm is effectively "no different than the ordinary relationship between a handler buying milk from

producers". All of the conditions of the purchase of milk are ones that any regulated handler may contract for with a producer. The evidence shows Petitioner can, and did, achieve its business purposes of acquiring milk from Oakridge absent a producer-handler status. The evidence was uncontroverted that the operation of the farm did not change after the lease. The Bahlers operated the farm before they operated it after.

Furthermore, Respondent maintains that the lease fails for a variety of reasons, including those that the connections between Oakridge Farm and Bahler Farms invalidate any effort at producer-handler status, independent of the principle that a handler cannot become a producer-handler merely by leasing herds of cows.

Respondent discounts the quality of milk argument by stating that whether one is a fully regulated handler or a producer-handler has nothing to do with the quality of milk sold. As any fully regulated handler, Petitioner contracts with a producer for milk to process and sell and may negotiate to obtain milk that meets certain quality standards. Petitioner's competitor, Stop & Shop, does that. Stop & Shop's Vice President for Manufacturing, Charles Arbing, testified that this company contracts with a milk supplier and pays them over order premiums to obtain milk that is RBST free and that meets Stop & Shop's quality requirements. (Tr. 453). Petitioner acknowledges that it does this as a business decision because it increases sales and brings more people into its stores to buy other products, further increasing profits. Petitioner made a judgment that entering into a contract for a certain quality milk from a supplier would serve its marketing needs. Respondent argues that the rest of the Order No. 1 handlers and producers should not be required to pay for Stew Leonard's marketing decisions.

Mr. Rasmussen, the Market Administrator, confirmed that these marketing decisions are outside the Order and that there is no "connection whatsoever between

producer-handler status and the quality of milk production." This point is illustrated by the fact that Petitioner has been operating with precisely the controls it seeks for the last year and has been a fully regulated handler that entire time.

It is maintained by Petitioner that the Market Administrator's decision that Stew Leonard's is not a producer-handler is arbitrary, capricious and an abuse of his administrative authority. Unequal treatment and lack of due process are claimed because Petitioner contends it has demonstrated that it has assumed the full risk of dairy farming, and the Market Administrator has granted producer-handler status to others (already producer-handlers) who have leased farms but plainly assumed less of the risk of dairy farming than has Stew Leonard's. To Petitioner, these distinctions have no discernible relation to any purpose of the milk-pricing regulations.

Additionally, Petitioner notes that the Market Administrator admitted that the term "dairy farmer" is not defined anywhere in the regulations. (Tr. 298), thus making him the sole power to decide what is and is not a dairy farmer. The Market Administrator based his decision on section (a) relating to the definition of a producer-handler.

A producer-handler is defined in the regulations 7 C.F.R. § 1001.10 in pertinent part, as follows:

> **Producer-handler** means any person who, during the month, is both a dairy farmer and a handler and who meet all of the following conditions:
>
> (a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's

own plant, and to distribute it as route disposition.

The wording of Milk Order No. 1. requires that a producer-handler operates the facilities as its "own enterprise" and at its "own risk." Instead the Administrator has substituted the stricter sounding terms "sole enterprise" and "sole risk" used in some other milk orders. *See. e.g. Kreider Dairy Farms, Inc. v. Glickman, supra,* noting that under Milk Order No., the definition of a producer-handler requires that milk production be "under the complete and exclusive control of such person and at his sole risk." Although he has not indicated in so many words, essentially, what the Market Administrator would require of Petitioner is ownership of the land.

I have considered all the contentions of the parties and based upon the facts and existing case law, must conclude that Petitioner is not entitled to producer-handler status.

Notwithstanding such conclusion, the aspect of this case, which concerns me most is that the Market Administrator holds undefined powers to use "administrative discretion." Inasmuch as this case may be reviewed by a Federal Court, such concerns are briefly summarized. There are no standards nor measuring sticks against which his conduct and discretion can be measured. Those who are subject to his regulation have no way of ascertaining if the Market Administrator is acting within the scope of his designation duties. It is true that one cannot expect that every little detail or administrative function must be precisely indicated as to those charged with the carrying out and enforcing of statutes and regulations. However, the issue involved herein is of substantive nature and not an incidental function.

The Respondent highlights the capacity of the present Market Administrator by showing the "*** has a wealth of experience, both as economist, and as an expert in the milk marketing order." This may be so, but what occurs

when some Market Administrator does not have these desirable qualities? How can such a person's performance be weighed to determine if he has operated within legal parameters? The far ranging effect of "administrative discretion" is illustrated in the following excerpts:

RASMUSSEN - DIRECT-EXAMINATION BY MR. TRACY

Q. What would be your concern if a producer/handler got a supplemental supply exceeding that or even greatly exceeding that up to 30, 40, 50 or 60 percent?

A. Well, initially if we find out that it's gone over 25 percent, and it can because you've got cows coming in and out of production, and you'll get variations, to get it under 25 percent. If they proceeded to have more than 25 percent, we'd inform them that they are a full handler.

Q. Why? I do not mean technically why you would to it. Why is it that you would consider them now to no longer be producer/handler even though they would still own their own farm and operate it?

If there supplemental supply gets up to 40 percent or even 30 percent, why is it that you would then determine that they are not a producer/handler?

A. Administrative discretion (Emphasis added).

Q. What would your concern? You are exercising your discretion. Why?

A. Well, because producer/handlers are supposed to buy from pool sources and not other producers. We have the additional problem of an increase in the amount of milk that is exempt form the Order.

The reason we got into this in the first place was that the producer/handler provision was meant to allow a dairy farmer who had his own plant and sales to be exempt from the Order. Unfortunately, since I've been here we haven't had an individual hearing in New England. They've all been national hearings. (Tr. 254-255).

RASMUSSEN - CROSS-EXAMINATION BY MR. WADE

Q. So none of those figured into your decision not to give them producer handler status?

A. Yes. You're correct.

Q. Correct. You made that back in February, 1998?

A. I made it several times, but the last one on the current lease was made in July.

Q. So those facts that you just testified to here about the insurance policy and the joint ownership, all that sort of stuff, that did not color your thinking? You were not going to give them producer/handler status anyway, right?

A. Those - would you, please -

Q. Sure. Those factors, such as the insurance policy you have testified about and the joint ownership of land and farms in the Bahler family and the different corporate names, you were not going to give Stew Leonard's producer/handler status regardless of that, right?

A. Correct. I made the decision that they weren't - that Stew Leonard's was not a producer/handler.

Q. So that from the point of view of this Judge, in deciding whether your decision back in February,

then at the latest in August when the last lease was signed, none of those figured into your administrative discretion, right? (Emphasis added).

A. That's correct. (Tr. 278-279).

BY MR. WADE:

Q. Now, Mr. Rasmussen, would you agree with me that you are a creature of statute and regulation?

A. Yes.

Q. Your job is defined by the statutes and the regulations, beyond which you cannot stray, correct?

A. My job? Yes.

Q. As an administrator, you are constrained to follow the law and the regulations that have been imposed upon you without coming up with some sort of ad hoc method of running your department, right?

A. There is some administrative discretion in what I do. (Emphasis added).

Q. Sure. You said that part of your task, as I understand it, is to administer both the farmers, the producers, the handlers, correct, and ultimately the public? Those are your clients?

MR. TRACY: I am going to object. He did not say he administers those. He only regulates handlers. He said he does it for the benefit of the producers, the public, etc., but he only regulates handlers. That was his testimony.

JUDGE BAKER: Very well. The objection is sustained. (Tr. 281-282).

Q. Okay. You have told us that when they sign those leases, if they increase their production capacity by more than 25 percent you are going to tell them no, you do not qualify as a producer/handler, right?

A. Each one of the producer/handler with leases when it was initially presented to the office was certainly under 25 percent.

Q. I understand, but now the question he asked you, Mr. Tracy asked you, was what if they come in and they want a lease which will result in increasing their production capacity by more than 25 percent? Will you give them producer/handler status?

A. I would not, no.

Q. No?

A. No.

Q. Under what authority will you not give them producer handler status?

A. Administrative discretion. (Emphasis added).

Q. Okay. Is that written down somewhere?

A. No sir. (Tr. 293-294).

Q. Okay. Let's suppose I live out in Simsbury, Connecticut. It is a nice little town out here. I have a couple acres of land. Suppose I buy a heifer, put it in my back yard. It looks nice to see a cow walking around in my yard. I feed it. I take care of it. I milk it. Am I a dairy farmer?

A. I'd have to further ask what you do with the milk?

Q. Drink it.

A. You drink it?

Q. Yes.

MR. TRACY: I am going to object because I think -

MR. WADE: I make cakes and cookies and mashed potatoes out of it.

MR. TRACY: -- the question omits a key element, which is a dairy farmer for what purposes?

JUDE BAKER: For profit or not. I do not know.

MR. TRACY: No. I mean in terms of definition, you cannot take it in a vacuum. Am I a dairy farmer for purposes of Market Order?

Remember, the Market Administrator does not regulate dairy farmers, ergo the definition of dairy farmer is sort of -

JUDGE BAKER: That is a good objection. It is sustained.

MR. WADE: Respectfully, Your Honor, respectfully, we are starting out with a regulation which leaves out the definition, so now I am asking the Administrator, who has already told us he engages in administrative discretion. (Emphasis added).

I am going to define it as I see fit. He can then agree or disagree. He may say no, I am not a dairy farmer. I am going to try to find the point where at he says yes, that is a dairy farmer. That is all I am doing is starting with the first hypothetical.

JUDGE BAKER: I understand exactly where you are going, Mr. Wade. I think in areas such as this, some thought should be given to having promulgation hearings -

MR. WADE: Right.

JUDGE BAKER: -- where the various views can be presented. Be that as it may, there has not been one on this as far as I know.

MR. WADE: Okay.

JUDGE BAKER: Just go ahead and proceed. (Tr. 298-300).

Q. Okay. Let's suppose instead of leaving the farm to me, Mr. Bahler thinks highly of his alma mater, Cornell University, an agricultural school, and he leaves his entire farm to Cornell University as an institution. Is Cornell University a dairy farmer for purposes of this regulation?

A. It depends what they do with the milk.

Q. The same thing they are doing now.

A. Sending it to -

Q. Yes, sending it to a co-op.

A. Yes.

Q. So Cornell University as an institution could be a dairy farmer?

A. Yes.

Q. The wealthy city person who never goes to the Farm, he could be a dairy farmer, right?

A. It depends what happens, where the milk is marketed.

Q. Okay. I am just trying to get the definitions down here. All right.

In order to become a producer handler, he must be both a dairy farmer and a handler, right?

A. Yes sir.

Q. Okay. Now, since you do not have a definition of dairy farmer in the regulation, this is one area you are going to have to give administrative discretion to in deciding whether somebody is or is not a dairy farmer, right? Correct? (Emphasis added).

A. Yes. (Tr. 305-306).

Q. Fair enough. I will start over to get us back in to the swing of this. It is not easy, is it?

Is it fair to say that there is nowhere in the regulation any rule that I can look at or the Judge can look at that says in effect if you are already a farmer, a dairy farmer, you are already a producer, you are already a handler and you want to increase your capacity by renting a few cows, here is how you do it? There is nothing in the reg that says that, right?

A. That's true.

Q. Okay. And you Market Administrators, and by this I am not referring to you as an individual, but you are making that up as you go along, right?

A. We use administrative discretion. (Tr. 315-316). (Emphasis added).

The Market Administrator's discretion has permitted others to lease cows and retain their designation as producer-handlers, even though they did not operate their

leased farms as their own enterprise or at their own risk (Tr. 317, 425, 441) and even though they have not assumed the full expense and risk of dairy farming. Were the effects of such leases weighed against economics and pricing considerations?

In one instance, a farmer and dairy operator retained its producer-handler status despite the existence of three leases pursuant to which the dairy "will be leasing [redacted] head of cattle...and [redacted] cattle barn(s)" and "will be responsible for all bills related to the feed, health care and management of the said [redacted] cattle." (PX-9(a), 9(b) and 9(c). Each lease was terminable by either party on thirty-days notice. *Id.* The leases said nothing about any risks associated with the farms, such as the risk that cows might perish, or that employees might cause harm, or that acts of God might cause damage. Rather, the dairy was responsible to pay only for feed, health care and management.

The Market Administrator testified that a dairy such as the one involved in the leases in PX-9(a)-(c) could obtain up to twenty-five percent of its milk[34] by the way of such leases without jeopardizing its producer-handler status. (Tr. 253). Therefore, the dairy would be escaping significant risks relating to up to one quarter of the farm operation that supplies its milk. If toxic sludge contaminated the feed of one quarter of the cows that provide the dairy with milk, causing genetic mutations that made all future generations unsuitable for milking, the dairy would escape absolutely free of charge or care.

Another lease judged adequate by the Market Administrator to confer producer-handler status simply "assigned and transferred" milk produced on a farm to the dairy that was leasing the cows. (PX-17, Section II(c)):

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[34] The Administrator conceded that the lessee had not assumed the full risks of operating the subject farm but was nevertheless granted producer-handler status.

Q. So, for the purposes of this farmer to farmer lease, you don't care if the producer handler actually producers the milk. Right?

A. That's correct.

(Tr. At 431) (cross-examination of Mr. Rasmussen). There is not any pretense that the producer is operating the farm – responsible for up to twenty-five percent of the producer's milk – as the producer's own enterprise or at the producer's own risk.

In the third lease, judged adequate by the Market Administrator, to confer the producer-handler status, the lessee assumed the risk of loss or damage to milk, and also agreed to indemnify the lessor against liability for injuries to workers, but did not otherwise assume the risks of operating the farm. (PX-18, 1.1; Tr. 441).

The Market Administrator justified such distinction by stating that the other lessees were producer-handlers prior to entering into leases and that they are limited to acquiring twenty-five percent of their milk from leased cows. What factors if any, other than administrative discretion, went into arriving at a twenty-five percent figure is unclear from the record evidence. Supposedly, the figure could have been any figure: 10%, 20%, 27%, etc..

When Respondent argues that the claimed effect of recognizing Petitioner as a producer-handler would be contributing to unfair competitive pricing of milk and creating disorderly marketing conditions, contrary to the purpose of the Order provisions, it does not address what economic and marketing impact the leases of twenty-five percent of production would have. Thus, if one is a producer-handler before leasing cows, he does not lose that status by reason of leasing cows providing twenty-five percent of the lessee's milk. However, there is no express language in the statute nor regulations to support the making of such a distinction based upon "administrative discretion." Moreover, why twenty-five percent versus some other figure. Does the twenty-five percent contribute

to unfair competitive pricing, I.e. cutthroat competition, and disorderly marketing conditions as to the amount of milk involved? If not, why; if so, to what extent.

The record evidence does not adequately address why, if Petitioner, using a small volume of milk were to be considered a producer-handler, there would be created disorderly marketing conditions, other than that others would seek to engage in similar leases to obtain producer-handler status. However, the economic and marketing effects are not explained if a producer-handler can lease twenty-five percent of its milk supply, which could amount to huge amounts of milk. The amount of milk involved in the three leases of producer-handler referred to herein is not set forth in the record.

Lack of specificity in the regulations allow unlimited authority to the Market Administrator and provide fertile ground of uncertainty for those subject to his regulation.

I have carefully considered the matters pondered above when I considered the Petitioner's contention that the Market Administrator's decision denying producer-handler status was arbitrary, capricious and an abuse of discretion and was, furthermore, an unconstitutional violation of the equal rights protection of the Constitution.

For reasons set forth above, I conclude that the evidence herein shows that the Market Administrator, in the subject case, made a reasoned decision in denying producer-handler status to Petitioner and that the Petitioner has not carried the burden of showing that the Market Administrator's determination was not in accordance with law. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that the Respondent has exercised reasonable discretion, for articulated reasons that do not deviate from nor ignore the ascertainable goal of the Marketing Order. Accordingly, the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law.

Order

The Petition herein is dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 10th day of September,
1999

s/ _____
Dorothea A. Baker
Administrative Law Judge

Lease Agreement

This Agreement, by and between Stew Leonard's of Norwalk, Connecticut and Oakridge Farm of Ellington, Connecticut, dated this 16th day of June, 1998.

WITNESSETH:

WHEREAS, Stew Leonard's is a seller and manufacturer of retail grocery and dairy products engaged in the sale and manufacturing of food products directly to the public.

WHEREAS, Oakridge Farm is a producer of milk and its by-products.

WHEREAS, Stew Leonard's is desirous of providing fresh milk and its by-products direct from its farm to its customers.

WHEREAS, Oakridge Farm is desirous of leasing its herd of dairy cows and all barns, milking parlors, personal property and equipment necessary for the production, processing and packaging of raw milk and related products.

NOW THEREFORE, the parties hereto agree as follows:

1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew

Leonard's agrees to replace culls and/or attrition with newly bred heifers.

2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.

3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk. also, Stew Leonard's agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice 60 days prior to change, is required in the event of any change in ownership or key management personnel by either Stew Leonard's or

Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change they will have the option to terminate the lease on the last day of the month of the change.

OAKRIDGE FARM	STEW LEONARD'S
By s/ _____	By s/ _____
Vern Bahler	Stew Leonard, Jr.
Its Partner	Its President

7 USC § 608c (2002)

§ 608c. Orders regulating handling of commodity

* * * *

(15) Petition by handler for modification of order; court review of ruling of Secretary.

* * * *

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia [District Court of the United States for the District of Columbia]) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a(6) of this title [7 USCS § 608a(6)]. Any proceedings brought pursuant to section 8a(6) of this title [7 USCS § 608a(6)] (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

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(18) Milk prices. The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if

such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 2 of this title [7 USCS § 602] shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c [7 USCS § 608b or this section], as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

§ 1001.2 Northeast marketing area.

The marketing area means all the territory within the bounds of the following states and political subdivisions, including all piers, docks and wharves connected therewith and all craft moored thereat, and all territory occupied by government (municipal, State or Federal) reservations, installations, institutions, or other similar establishments if any part thereof is within any of the listed states or political subdivisions:

Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and District of Columbia

All of the States of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and the District of Columbia.

Maryland Counties

All of the State of Maryland except the counties of Allegany and Garrett.

New York Counties, Cities, and Townships

All counties within the State of New York except Allegany, Cattaraugus, Chatauqua, Erie, Genessee, Livingston, Monroe, Niagara, Ontario, Orleans, Seneca, Wayne, and Wyoming; the townships of Conquest, Montezuma, Sterling and Victory in Cayuga County; the city of Hornell, and the townships of Avoca, Bath, Bradford, Canisteo, Cohocton, Dansville, Fremont, Pulteney, Hartsville, Hornellsville, Howard, Prattsburg, Urbana, Wayland, Wayne and Wheeler

in Steuben County; and the townships of Italy, Middlesex, and Potter in Yates County.

Pennsylvania Counties

Adams, Bucks, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Juniata, Lancaster, Lebanon, Montgomery, Perry, Philadelphia, and York.

Virginia Counties and Cities

Arlington, Fairfax, Loudoun, and Prince William, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park.

§ 1001.10 Producer-handler.

Producer-handler means a person who:

(a) Operates a dairy farm and a distributing plant from which there is monthly route disposition in the marketing area during the month;

(b) Receives milk solely from own farm production or receives milk that is fully subject to the pricing and pooling provisions of this or any other Federal order;

(c) Receives at its plant or acquires for route disposition no more than 150,000 pounds of fluid milk products from handlers fully regulated under any Federal order. This limitation shall not apply if the producer-handler's own farm production is less than 150,000 pounds during the month;

(d) Disposes of no other source milk as Class I milk except by increasing the nonfat milk solids content of the fluid milk products; and

(e) Provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) and the processing and packaging operations are the producer-handler's own enterprise and at its own risk.

§ 1001.10 Producer-handler.

Producer-handler means a person who, during the month, is both a dairy farmer and a handler and who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The quantity of route disposition in the marketing area from the person's plant is greater than in any other Federal marketing area.

(d) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion pursuant to § 1001.15. If the producer-handler's receipts from own production and the total route disposition from the producer-handler's plant each exceed 4,300 pounds per day for the month, the producer-handler's receipts from pool plants are not in excess of 2 percent of receipts from own production. For the purposes of this paragraph, the producer-handler's receipts of fluid milk products shall include receipts from plants of other persons at all retail and wholesale outlets that are located in a Federal marketing area and operated by the producer-handler, an affiliate, or any person who controls or is controlled by the producer-handler.

7 C.F.R. § 1001.10 (1999) amended by Milk in the New England and Other Marketing Areas; Order Amending the Orders, 64 Fed. Reg. 47898 (Sept. 1, 1999).